No. 154.

Brf. of Bowers, Kellogg & Dunlap for Appellees.

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Supreme Court of the United States.

OCTOBER TERM, A. D. 1901.

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APPEAL FROM THE CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

INTERSTATE COMMERCE COMMISSION,
Appellant,

vs.

CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY et al.,
Appellees.

154

BRIEF FOR APPELLEES.

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ROBERT DUNLAP,
OF COUNSEL FOR APPELLEES.

The Gunthorp-Warren Printing Company, 53 Dearborn St., Chicago.

Supreme Court of the United States.

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BRIEF FOR APPELLEES.

The proceeding in which the present appeal has been taken was begun by petition presented March 3, 1899, by the Interstate Commerce Commission to the Circuit Court of the United States for the Northern District of Illinois, Northern Division, whereby the Commission sought enforcement of orders made by it under date January 20, 1898, and August 4, 1898. The proceeding is under Section 16 of the act of Congress approved February 4, 1887—known generally as the Interstate Commerce Law—as amended by the act of March 2, 1889, Section 5. By the first of its orders the Commission directed the Atchison, Topeka and Santa Fe Railway

Company, the Chicago, Rock Island and Pacific Railway Company, the Chicago and Alton Railroad Company, the Chicago, Burlington and Quincy Railroad Company, the Chicago and North-Western Railway Company, the Chicago, Milwaukee and St. Paul Railway Company, the Chicago Great Western Railway Company, the Illinois Central Railroad Company and the Wabash Railroad Company (being the appellees) "to cease and desist, on or before the first day of April, 1898, from charging, demanding, collecting or receiving (in addition to their regularly published transportation charges) the sum of $2 per car load of live stock as compensation for terminal service rendered in making delivery of live stock at the stock yards of the Union Stock Yards and Transit Company, in the City of Chicago, State of Illinois, which said charge is found and held in and by said report and opinion of the Commission to be unreasonable, unjust and unlawful." (Rec., 46, 47.) The second of the Commission's orders, bearing date August 4, 1898, is a mere reiteration of the first order, and was made after application for rehearing. (Rec., 55.)

The Circuit Court dismissed the Commission's petition, after hearing, on the merits. (98 Fed. Rep., 173.) Appeal was thereupon taken to the Court of Appeals for the Seventh Circuit, where the action of the Circuit Court was affirmed. (103 Fed. Rep., 249.) This appeal is taken from the judgment of the Circuit Court of Appeals.

STATEMENT OF FACTS.

The general history of this litigation may be correctly, and for present purposes sufficiently, outlined as follows, details being left for more convenient presentation in connection with the points of this brief to which they are pertinent.

1. The Union Stock Yards and Transit Company is a corporation which was organized in 1865, and has ever since owned and maintained extensive stock yards in the southern part of Chicago and a considerable length of tracks (at present 240 miles) connecting the Stock Yards with the various railroads of Chicago. (Rec., 22.) The roads of some of the appellee companies are directly reached by these tracks of the Stock Yards Company; but the roads of the Great Western, the Burlington, the Milwaukee and St. Paul and the Atchison companies do not directly connect with the tracks of the Stock Yards Company. None of the roads of appellee companies runs to the Stock Yards, and consequently cars of live stock arriving in Chicago over appellees' roads, and consigned to the Stock Yards, have to traverse the connecting tracks of the Stock Yards Company; and, also, if the live stock arrives over the Great Western, the Burlington, the Milwaukee and St. Paul, or the Atchison road, have to traverse the tracks of one or more independent railroad companies intermediate between the tracks of said appellee companies and the tracks of the Stock Yards Company. No appellee has any proprietary interest whatever in, or control over, the tracks or any property of the Stock Yards Company; and the carriage of live stock to the Stock Yards over those tracks is merely under a revocable license.

The distance from the Stock Yards to the point where cars of live stock leave the roads of appellee companies (consequently the length of track not owned by appellee companies, which cars of live stock have to traverse in going from appellees' roads to the Stock Yards) varies from two to nine miles. (Rec., 27.)

Before June 1, 1894, the Stock Yards Company made no charge to the railroad companies for use of its tracks in getting cars of live stock to its yards; but on that date, for reasons of its own, the Stock Yards Company imposed, and it has since maintained, a trackage charge for such use of its tracks, varying from 40 cents per car each way in the case of the shortest routes to 75 cents per car each way for the longest routes. (Rec., 24.) Since 1878, none of the railroad companies has had any financial interest whatever in the Stock Yards Company, though until June 1, 1894 (when the stated trackage charges were established), certain of the railroad companies were allowed representatives on the directory of the Stock Yards Company. Even before 1878, not all the railroad companies held stock of the Stock Yards Company; and the Great Western, Milwaukee and St. Paul, Atchison and Wabash Companies never had any financial interest in the Stock Yards Company. (Rec., 23.) When the trackage charges were ordered by the Stock Yards Company in 1894, the railroad officers who were on its directory resigned from their directorship in protest, and since then no railroad company among appellees has had any representation on the board of directors of the Stock Yards Company, or any relation of interest or control with that company. (Rec., 24, 43.) It is undisputed, however, that the Stock Yards Company has a legal right to charge the railroads for the use of its tracks. (Rec., 24.)

Before June 1, 1894, and while the Stock Yards Company was making no charge for use of its tracks for trans-

portation of live stock to the Stock Yards, the appellee companies made no terminal charge for the service of carrying live stock off their own roads to the Stock Yards and there delivering the stock. Their tariffs, consequently, up to June 1, 1894, simply made a single entire charge (varying, of course, according to place of shipment) to Chicago; and this so-called "flat rate" applied wherever in Chicago delivery might be asked by the shipper. On June 1, 1894, however, tariffs (the regular filing and publication of which according to law is not questioned) were made effective by each of appellee companies, whereby it was provided that after June 1, 1894, the "flat" or ordinary Chicago rate should apply only on shipments of live stock not going to the Union Stock Yards, but deliverable elsewhere in Chicago on appellees' own lines of road, and that an additional charge of $2 per car—beyond the flat rate—would be made on live stock delivered at the Union Stock Yards. (Rec., 24.) These tariffs, whereby appellees created a terminal charge for the terminal service of hauling live stock over the tracks of the Union Stock Yards and Transit Company (and in the case of four appellees, over the tracks likewise of other railroad companies intermediate between such appellees' own tracks and the Stock Yards Company's tracks), and for the further terminal service of having the stock delivered at the Union Stock Yards, are a central point in the defense of appellees against the orders made by the Interstate Commerce Commission; and these tariffs are set out at length in the record, as follows, for the several appellee companies:

Chicago and North-Western Railway Company. (Rec., 196.)

Chicago and Alton Railroad Company. (Rec., 196.)

Atchison, Topeka and Santa Fe Railway Company. (Rec., 197, 198, 199, 205, 206.)

Illinois Central Railroad Company. (Rec., 207, 208.)

Chicago, Burlington and Quincy Railroad Company. (Rec., 208.)

Wabash Railroad Company. (Rec., 209, 213.)

Chicago Great Western Railway Company. (Rec., 213.)

Chicago, Rock Island and Pacific Railway Company. (Rec., 214, 215, 216, and 220.)

Chicago, Milwaukee and St. Paul Railway Company. (Rec., 220, 223, 229 and 230.)

As filed on behalf of all appellees by the Western Freight Association. (Rec., 244, 246.)

The effect of these tariffs of June 1, 1894, in establishing after that date separate charges for transportation to Chicago and for the further and different service of transportation over the tracks of the Union Stock Yards Company (and, in certain instances, over intermediate tracks), and delivery at the Union Stock Yards, will be fully presented in the course of the following brief (Points II and III), upon consideration of their exact language. It may be added now that these tariffs are all substantially alike in their wording, and are just such as the Court of Appeals directly passed upon in *Walker* v. *Keenan*, 73 Fed. Rep., 755.

The decision just cited closed what may be called the first half of the controversy over the $2 terminal charge, and was as follows: The Atchison, Topeka and Santa Fe Railroad Company (predecessor of the appellee, Atchison Railway Company) being in the hands of receivers when the terminal charge was established in June, 1894, a commission merchant at the Union Stock Yards named Keenan petitioned the Circuit Court of the United States for the Northern District of Illinois (which had appointed the receivers) to direct its receivers to deliver to him at the stock yards, without payment of a terminal charge, and

upon payment merely of the flat Chicago rate, four cars of cattle which had been shipped by him from Kansas City over the Atchison road. Thirty-six other commission merchants doing business at the Stock Yards filed a similar petition, asking general direction to the receivers to transport live stock to and deliver it at the Union Stock Yards for the flat Chicago rate, and without collection of the terminal charge. These petitions, of course, directly presented two questions: (1) Whether separate charges could lawfully be made for the transportation as far as Chicago and for the terminal transportation from the Atchison Company's own road over the Union Stock Yards Company's tracks to the Union Stock Yards; and (2) whether the Atchison Company's tariff of June 1, 1894, sufficed to effect such a separation of charges. The Court of Appeals decided both questions in the affirmative, and denied Keenan and the other commission merchants the relief they had prayed. (73 Fed. Rep., 755.)

Application was made to this court for a writ of certiorari, to review the judgment of the Court of Appeals, and was supported by briefs; but the application was denied.

After defeat in the courts on the question whether a terminal charge could lawfully be made in addition to the flat Chicago rate, resort was had to the Interstate Commerce Commission, and a proceeding before that Commission was begun, which resulted in the orders now sought to be enforced. The general purpose of this application to the Commission was to have the terminal charge declared unreasonable,—the previous controversy having been over the legality of that charge, even if reasonable in amount. The Cattle Raisers' Association of Texas filed the complaint before the Commission September 1, 1896 (four months after the decision in the Walker-Keenan case). (Rec., 2.) An intervening petition was filed March 10, 1897, by the Chicago Live Stock Exchange (being an association

of live stock commission merchants, including in its membership the thirty-seven petitioners in the Walker-Keenan proceeding). (Rec., 3.) After answer and hearing, the Commission, on January 20, 1898, filed its findings and opinion (Rec., 18–45), and the first order which is the subject of this appeal. (Rec., 46.)

Appellees moved the Commission for a further hearing on the ground that its finding that the terminal charge is unreasonable contravened, not only undisputed evidence that the terminal service actually costs more than the amount of the terminal charge, but also admissions by the complainants that the charge is reasonable. (Rec., 76, 94, 111, 136.) The Commission, upon consideration of the application for rehearing, modified its findings somewhat as to the reasonableness of the $2 charge, indulged itself in considerable further argument, and reiterated its previous order. (Rec., 48, 55, 55-6.)

2. While many of the facts found by the Commission may best be presented (with proper references to the portions of the record where they appear) in connection with the various defenses on which they bear, the attention of the court is at once called to the fundamental fact that the Commission explicitly finds that the actual cost of the service of carrying a car of live stock to the Union Stock Yards from the point of connection of any of appellees' tracks with the tracks of the Union Stock Yards and Transit Company (or with the other intermediate tracks which have to be traversed in passing from appellees' tracks to the Stock Yards Company's tracks) is not less than $2 per car; and that for many of the appellee companies such actual cost of the terminal service far exceeds $2 per car. Nor is any profit whatsoever included in this finding of the cost.

Thus the commission finds:

"It has already been indicated that the different defendants make connection with the tracks of the Union Stock Yards and Transit Company at various points and in various ways, so that the actual expense to the several defendants of transporting a carload of live stock from their own iron to the stock yards varies in different cases.

The intervenor conceded upon the trial, and the complainants did not seriously question, that the amount of this charge was reasonable it, under the circumstances, the charge should be imposed. Before the close of the testimony the several defendants were requesetd by the Commission to furnish statements showing the actual or estimated expense to them in each case of making delivery from their several tracks to the Union Stock Yards.

Such statements have been filed and they make the following showing:

Illinois Central Railroad, via 75-cent trackage route	$2.23	
via 40-cent trackage route	1.65	
Average		$1.94
Chicago, Burlington and Quincy Railroad		2.25
Chicago and Alton Railroad		2.05
Chicago, Milwaukee and St, Paul Railway, via one route	2.67	
via other route	2.25	
Average		2.46
Atchison, Topeka and Santa Fe Railway		2.28
Chicago Great Western Railway (average of 10 cars to train)		2.20
Chicago and North-Western Railway		3.34
Wabash Railroad		1.86
Chicago, Rock Island and Pacific Railway		1.65
Total via nine lines		$20.03
Average		2.22

In some instances the foregoing figures are based upon the actual cost of operations for a year or longer, while in other cases they are estimates. There does not seem to be much difference between the actual

result and the estimate, having reference to the service performed. Several things should be borne in mind in reference to these figures. In all cases the unloading charge paid by the defendants to the Union Stock Yards & Transit Company of 25 cents per car is included. All the defendants apparently maintain offices at the Union Stock Yards, in most, if not all, cases the expense of these offices or agencies is included. In every case not only is the trackage paid the Union Stock Yards and Transit Company embraced, but also whatever trackage charge, if any, a particular railroad company is obliged to pay some other company for the purpose of reaching the tracks of the Union Stock Yards and Transit Company. For instance, the Chicago Great Western Railway Company includes a charge of 75 cents for trackage over the tracks of the Chicago Central; the Chicago, Burlington and Quincy includes a trackage charge of 35 cents over the Pan Handle; the Chicago, Milwaukee and St. Paul includes a trackage charge of 65 cents in one case and 37½ cents in the other case which it pays in reaching the iron of the stock yards; the Atchison, Topeka and Santa Fe uses the tracks of the Chicago and Grand Trunk, for which it pays about 65 cents per car. These trackage charges paid to other parties than the Union Stock Yards and Transit Company are in all cases actually paid and are in all cases necessary to reach the stock yards." (Rec., 25–26.)

It should be said, in explanation of portions of the foregoing quotation, that the Illinois Central Company and the Milwaukee and St. Paul Company can reach the Union Stock Yards by two different routes of different lengths,—of which one or the other is used as the shipment arrives at Chicago over one or another route; and hence the cost of the terminal service for these two companies varies with the shipment. Further explanation as to the Illinois Central Company should be made in the language of the Commission itself (at the end of its opinion on the application for rehearing):

"As stated in the former report and opinion, the Illinois Central Railroad Company transfers from its

lines to the Union Stock Yards over two routes, by one of which the trackage charge is 75 cents and by the other 40 cents each way. It appeared from the statement furnished by that company that there were certain other differences in the cost of transportation, making the cost via the 75-cent trackage route $2.23, and by the 40-cent trackage route $1.65, an average of $1.94, which was so stated.

Counsel for that company now call attention to the fact that, inasmuch as more live stock is carried over the 75-cent route than over the other, the actual average cost to that company is not $1.94, but is $1.997 per car." (Rec., 55.)

The Commission's second opinion, rendered upon the application for rehearing, finally and emphatically disposed of the question of the reasonableness of this terminal charge, as follows:

"The application is based upon the ground that the complainant and the intervenor admitted upon the hearing 'that the $2 terminal charge is a reasonable charge, provided any charge could legally be made for the terminal service,' and it is urged that in the face of this admission the charge ought not to be found unreasonable.

The report and opinion of the Commission already published finds that the complainant did not make the admission claimed by the defendants, and an examination of the record apparently supports that finding. At the bottom of page 540 of the testimony appears the following:

'Mr. Newlin: The gentleman said something about an admission. So far as I am concerned I do not know what he refers to.

Mr. Bowers: The admission in this instance was made by the very gentleman who asks the question.

Com'r Prouty: That if this charge was proper to be imposed, it was a reasonable charge.

Mr. Newlin: I did not admit that.'

So far as we can ascertain, this is the last reference made in the record to any admission of that sort. Mr. Newlin acted as the sole attorney and representative for the complainant, and we do not

think it can be said upon this state of the record that the complainant is concluded by any admission of the kind claimed. The case already exactly states the fact in that particular.

The Commission itself did, however, state upon the hearing at various times, in terms upon which the defendants were justified in relying, that no question could be successfully made as to the reasonableness of this charge in certain aspects. Just exactly the scope of that intimation can be understood by referring to the circumstances under which it was given. The defendants were proceeding to show by testimony in each case that the actual cost to them of transporting these carloads of live stock, including the trackage charge and the cost of unloading, was equal to or in excess of $2. Thereupon it was suggested by the Commission, admitted by the intervenor, and at first partly admitted by the complainant, that the cost of service, including the trackage charge and the cost of unloading, was sufficient to justify the imposition of this terminal charge, provided, under the circumstances of the case, it could properly be imposed. We understand that the defendants are given the full benefit of this in the report and opinion already filed. *To remove all doubt upon that subject, however, if it is not clearly found, we now find that, looking entirely to the cost of service, and including as a part of that cost the trackage charge paid the Union Stock Yards and Transit Company and the unloading charge paid that same company, the amount of this terminal, if, under the circumstances of this case, it is proper to impose the charge, is reasonable.* If any modification of the present findings is necessary, they are hereby modified to that extent." (Rec., 48, 49.)

3. Any claim of undue prejudice to Chicago through this terminal charge was likewise effectually disposed of by the Commission itself, which found that, if the charge is not unreasonable in amount, it creates no unjust discrimination. Thus,—

"There undoubtedly may be instances in which the adjustment of rates, each of which is entirely reasonable and proper in itself, works a violation of

the third section, but the present case is not one. *We hold that, if the imposition of this terminal charge at Chicago is just and reasonable, the fact that similar charges are not imposed by the defendants at the other competing stock markets referred to does not make this an undue preference under the third section.*" (Rec., 38.)

The detailed facts from which this conclusion was reached are fully stated in the Commission's findings. (Rec., 36-38.)

In its opinion upon the application for rehearing the Commission re-stated the same view, that the terminal charge is not discriminatory except to such an extent as it may be inherently unreasonable. Thus,—

"The claim of the complainant, and especially of the intervenor, was that a uniform terminal charge must be imposed at all these stock markets, and that inasmuch as the defendant absorbed the corresponding terminal charges at other stock markets, they must absorb this charge at Chicago. We held that this did not necessarily follow; that the carrier was free to a certain extent to absorb or not absorb, to make or not to make charges of this character according to the exigencies under which its business was conducted. The conclusion of the Commission upon that point was stated in the following words:

'*We hold that if the imposition of this terminal charge at Chicago is just and reasonable, the fact that similar charges are not imposed by the defendants at the other competing stock markets referred to does not make this an undue preference under the third section.*'

We have decided, however, that *to the extent of* $1 *the imposition of this terminal at Chicago is not just and reasonable,* and the question now is, how does *that* leave the case as to the third section?

For many years previous to June 1, 1894, the defendants had maintained a certain fixed relation in rates between these different cattle markets. On June 1st they increased the expense of placing cattle upon the Chicago market by just $2 per car. If the relative rates were right before, and we may fairly presume, in the absence of any claim to the contrary,

that they were, this charge disturbed those rates to that extent. If the increase in the Chicago rate was justifiable, no undue prejudice would be worked against Chicago. We have found that to the extent of $1 per car it was unjustifiable. It results, therefore, that the defendants have disturbed the just relation of rates between these different centers by imposing, without reason or justification, an additional charge upon the rate to Chicago.

There being no excuse for the imposition of this additional charge, we think it necessarily follows that an undue prejudice against the market of Chicago is thereby created. *It is the want of justification which makes the preference undue.*" (Rec., 54, 55.)

The question whether the terminal charge is unjust as a discrimination is therefore practically eliminated from the case; for the Commission finds it not to be discriminatory, unless unreasonable; and by its order forbids only one-half, *i. e.*, $1 of the charge, which the Commission found to be the measure of its unreasonableness. If the charge is unreasonable, it is of course unlawful; and no inquiry whether it is an unjust discrimination need be pursued. If, on the other hand, the charge is reasonable, the Commission has itself declared it not to be an unjust discrimination.

4. It is worth while to notice at the outset how the Commission came to decide against one-half ($1) of the terminal charge, after finding that the terminal service actually costs each appellee company more than $2, and that no undue prejudice is wrought by a charge that is reasonable. The somewhat extraordinary process by which the Commission reached this result consisted (if we may attempt to indicate the fundamentals of the Commission's reasoning) of two theories:—

(1) That a charge may be unreasonably large in spite of its not exceeding the cost of the service for which it is

imposed, in consequence of extraneous considerations of "equity" and general fairness.

(2) That the $2 charge is levied for a service (*i. e.*, transporting from appellees' own lines to the stock yards over the Stock Yards Company's tracks, and over intermediate tracks of other companies, and delivering at the stock yards), for which the flat Chicago rate is likewise levied—notwithstanding the express tariffs of June 1, 1894, to the contrary—and that consequently the shipper is called upon to pay twice for the terminal service.

The following brief extracts from this argument may serve to show that we do the Commission no injustice:

> "It must be accepted as the law of this case that there is no legal obligation, under the circumstances presented, upon the part of the various carriers to make delivery at the Union Stock Yards. They have a legal right to impose a charge of the nature which they do impose.
>
> We do not think, however, that this is the question presented to us for determination. Most questions coming before this Commission are questions of fact, not questions of law. Whether a particular thing should be considered as a legal question, but when it has once been determined what elements, as a matter of law, are to be taken into account, almost every case resolves itself into a question of judgment. Upon a survey of the whole situation, looking at these matters from the standpoint of both parties, what, in fairness to the public and the railroads alike, ought to be done? This is the thing for determination here. That the defendants may charge one sum to Chicago and an additional sum for delivery at the Union Stock Yards, as a legal proposition, has been settled. *Whether they ought to make the charge they do, or any charge, or whether the charge for delivery is already fairly included in the rate, is a proposition of fact for consideration.* Under all the circumstances, is this terminal charge a 'just and reasonable' one under the first section?" (Rec. 41.)

"But this question is broader than the mere cost of service. It embraces the whole situation, in which the cost of service is but a single factor." (Rec., 41.)

"We do not believe that these carriers should be allowed to add an arbitrary charge to the Chicago rate for doing a thing which they for thirty years have said was included in that rate, and which we believe, considering the manner in which rates are made up and in which this rate has been made up, ought to be included in the rate." (Rec., 43.)

"To remove all doubt upon that subject, however, if it is not clearly found, we now find, that in looking entirely to the cost of service, and including as a part of that cost the trackage charge paid the Union Stock Yards and Transit Company and the unloading charge paid that same company, the amount of this terminal if, under the circumstances of this case, it is proper to impose the charge, is reasonable. If any modification of the present findings is necessary, they are hereby modified to that extent.

That finding must, however, be carefully read in connection with the other facts in the case, and the conclusion of the Commission that the imposition of this terminal charge is unreasonable. The defendants say it was admitted that this charge was reasonable, 'provided any charge could be legally made for the terminal service.' The intimation of the Commission was, as indicated in the above extracts from the record, 'that if this charge was proper to be imposed, it was a reasonable charge.' The reason for the conclusion of the Commission is to be found in the distinction between these two statements. What the Commission passed upon finally was, not whether a terminal charge of this sort could be legally made,—that had been already determined by the courts,—but whether this particular charge could be properly imposed under the circumstances of this case." (Rec., 49.)

"We have found that to the extent of $1, a new condition did justify the additional charge for the reason that then, for the first time, the Stock Yards Company exacted this trackage charge. In other words, the cost of service to the defendants was

increased by just $1 on that day. It must follow, therefore, as a necessary conclusion, that of the increase which the defendants made, $1 was justifiable and $1 was unjustifiable. This is not, however, because $2 is an unreasonable charge for transporting a car to the stock yards, if that service was performed by some independent agency, *but because since the defendants were already receiving compensation for this service, they ought not to charge for it the second time. Of this proposition we have no doubt.*" (Rec., 50.)

"This decision of the Circuit Court of Appeals the Commission accepts. It assumes that, as a legal proposition the carrier may make a charge of the sort which it attempts to make in this case, but it holds, as a matter of fact, that it is unreasonable to impose this terminal charge *for the reason that the rate to Chicago already includes that charge.* The Circuit Court of Appeals says that the carrier may segregate its rate, charging one part to a certain point and another part beyond that point, but there is a wide difference between segregation and addition. *What the carriers have done here is to add an arbitrary sum for a service for which they are already receiving a reasonable compensation.*" (Rec., 51.)

These quotations amply show that the the Commission proceeded on the two theories indicated above as their fundamental lines of argument.

5. While the flat or ordinary Chicago rate is, from a large part of the territory consigning live stock to Chicago, a joint rate, made and shared by the respective appellees with numerous other carriers originally made defendants in the proceeding before the Commission, the terminal charge is made and enjoyed solely by the appellee companies, which alone do the terminal service. (Rec., 19, 24.) The carriers which share in the joint Chicago rate, but do not participate in the terminal work or in the terminal charge, were dismissed from the proceeding by the Commission; and the orders of the Commission, here

sought to be enforced, are directed only to appellees, being the terminal carriers.

6. Admittedly the appellees have not conformed to the orders of the Commission, which the courts are now asked to enforce, but have been collecting the terminal charge continuously since its establishment, June 1, 1894.

GENERAL STATEMENT OF APPELLEES' POINTS.

Our argument will fall under the following general heads:

I. The Interstate Commerce Commission had no jurisdiction to make the orders here sought to be enforced, for the reason that such orders are attempts on the part of the Commission to make maximum rates for the appellees.

II. The tariffs put into effect on June 1, 1894, and since maintained, conclusively overthrow the contention that the $2 charge established by those tariffs is a second charge imposed for a service which appellees had agreed to perform for the ordinary Chicago rate; and, indeed, the orders of the Commission are themselves inconsistent with that contention.

III. The terminal or switching charge established by the tariffs in force since June 1, 1894, is for the service of carrying live stock to the Stock Yards over the tracks of the Stock Yards Company (and in the case of the Great Western, the Burlington, the Milwaukee and St. Paul, and the Atchison Companies over the tracks, also, of other railroads intermediate between such appellees' own tracks and the Stock Yards Company's tracks) and of delivering at the Stock Yards, from two to nine miles away from appellees' own tracks; while the ordinary Chicago rate has applied since June 1, 1894, only to transportation upon appellees' own railroads, without the further service of carriage to and delivery at the Stock Yards.

This establishment of distinct charges for wholly different services—on the one hand, of ordinary transportation on appellees' own roads; and, on the other hand, of carrying off appellees' own roads to the Stock Yards and making delivery there—was reasonable and lawful under the cir-

cumstances of the case, and has many substantial advantages, both to the appellees and to the public.

IV. A proceeding such as this, under section 16 of the Interstate Commerce Act, calls upon the Federal Courts to exercise their independent judgment upon the facts as well as the law of the case; and the conclusions of the Commission upon questions of fact must be rejected by the courts if such conclusions contravene rules of legal inference from admitted or established facts, or if such conclusions appear to the courts to be against the preponderance of evidence. The facts by which the Commission's conclusions of fact are to be tested may of course be furnished either by the Commission's own findings or by extraneous evidence introduced on the hearing in court.

V. Only the $2 charge,—and not the general Chicago rate,—was the subject of complaint before the Commission, or was investigated by the Commission, or is the basis of the Commission's orders here sought to be enforced. No question concerning the general Chicago rate is involved in this proceeding; and if the terminal charge is itself lawful, the Circuit Court was right in dismissing this proceeding, and its action must be affirmed by this court, without any consideration of the propriety of the general Chicago rate.

VI. The $2 terminal charge is shown by the Commission's own findings to be less than the actual cost of the terminal service for which it is charged, and therefore is conclusively proved to be reasonable.

VII. No claim can be made that the terminal charge constitutes an undue prejudice against Chicago because the Commission has itself found that it is not, unless it is unreasonable, (and therefore the case reduces to a question whether the amount of the terminal charge is too great

for the service for which it is charged); and because the Commission's orders, here sought to be enforced, condemn the terminal charge absolutely, as unreasonable, and not as a discrimination.

The facts found by the Commission would show (if the question were here involved) that the terminal charge actually works no undue prejudice to Chicago.

VIII. The Interstate Commerce Commission is not empowered to administer the Anti-Trust Act, and therefore the courts cannot administer that Act in proceedings under section 16 of the Interstate Commerce Law to enforce the Commission's orders. Nor is any violation of the Anti-Trust Act claimed in the petitions to the Interstate Commerce Commission, in which this controversy originated, or found by the Commission to have occurred, or shown by any facts in the record to exist. Further, if the terminal charge had been established by an arrangement between appellees in illegal restraint of competition, that would be no reason for reducing the amount of the charge, if $2 is not an unreasonable amount.

IX. The Circuit Court ruled correctly in its exclusion of evidence at the hearing below.

X. Neither the Circuit Court nor this court has jurisdiction in a proceeding like the present to modify the orders of the Commission sought to be enforced. The only question which such a proceeding brings before the courts is whether the orders of the Commission should be enforced as made by the Commission.

ARGUMENT.

I.

THE INTERSTATE COMMERCE COMMISSION HAD NO JURISTION TO MAKE THE ORDERS HERE SOUGHT TO BE ENFORCED, FOR THE REASON THAT SUCH ORDERS ARE ATTEMPTS ON THE PART OF THE COMMISSION TO PRESCRIBE MAXIMUM RATES FOR APPELLEES.

1. It is now settled that the Commission has no power to prescribe railroad rates—whether maximum, minimum or absolute—for the future.

Interstate Commerce Commission v. *Cincinnati, New Orleans & Texas Pacific Railway Company*, 167 U. S., 479.

Interstate Commerce Commission v. *Alabama Midland Railway Company*, 168 U. S., 144.

Cincinnati, New Orleans & Texas Pacific Railway Company v. *Interstate Commerce Commission*, 162 U. S., 184.

This is true whether the Commission proceeds upon its own initiative, or attempts the prescription of rates in an order made upon complaint to it. Thus this court says:

> "That Congress has not conferred upon the Interstate Commerce Commission the legislative power of prescribing rates, either maximum or minimum or absolute; and that, as it did not give the express power to the Commission, it did not intend to secure the same result indirectly by empowering that tribunal, after having determined what, in reference to the past, were reasonable and just rates, to obtain from the courts a peremptory order that in the future railroad companies should follow the rates thus determined to have been in the past reasonable and just." (168 U. S., 161, 162.)

2. The orders of the Commission involved in this proceeding are attempts by the Commission to prescribe the maximum charge of appellees for the terminal service of transporting live stock to the Union Stock Yards. The order of January 20, 1898 (which the second order merely reiterates), should here be quoted:

> "It is ordered and adjudged that the report and opinion of the Commission on file herein be, and the same is hereby, made a part of this order. That the defendants, the Atchison, Topeka and Santa Fe Railway Company, the Chicago, Rock Island and Pacific Railway Company, the Chicago and Alton Railroad Company; the Chicago, Burlington and Quincy Railroad Company, the Chicago and North Western Railway Company, the Chicago, Milwaukee and St. Paul Railway Company, the Chicago Great Western Railway Company, the Illinois Central Railroad Company and the Wabash Railroad Company be, and they severally are, hereby notified and required to *cease and desist, on or before the 1st day of April* 1898, *from charging, demanding, collecting or receiving (in addition to their regularly published transportation charges) the sum of $2 per carload of live stock as compensation for terminal services rendered in making delivery of live stock at the stock yards of the Union Stock Yards & Transit Company* in the City of Chicago, State of Illinois, which said charge is found and held in and by said report and opinion of the Commission to be unreasonable, unjust and unlawful. That said defendants be, and they severally *are, hereby recommended not to charge, demand, collect, or receive in excess of $1 per carload as compensation for terminal or switching services rendered in the delivery of live stock at the yards of the Union Stock Yards & Transit Company* in said City of Chicago, which said sum of one dollar per carload as compensation for such terminal or switching services is found and declared in and by said report and opinion to be just, reasonable and lawful." (Rec., 46, 47.)

If this order, instead of "recommending" that no more than $1 be charged for the terminal service, commanded that course, it would need no argument to show that it

was an attempt to prescribe the maximum rate of $1 for the future, and so beyond the Commission's powers. So much the Commission itself admits, as will appear from its following explanation of the vagaries of its order:—

> "Our judgment is, therefore, that the exaction of a terminal charge of more than $1 per car is in violation of the first and possibly of the third section of the act, and that the defendants ought not to exact more than this sum. To order them not to do so would, however, be prescribing a rate for the future, and that, under the decision of the United States Supreme Court in *Interstate Commerce Commission* v. *Cincinnati, N. O. & T. P. R. Co.*, 167 U. S., 479; 42 L. Ed., 243, we have no power to do. We shall make an order directing the carriers to cease and desist from charging and collecting the present charge of $2. The Supreme Court in the case above referred to bases its decision upon the ground that the Interstate Commerce act does not in express terms delegate to the Commission the power to prescribe a rate. It is intimated in that case that the power of Congress to do so, had it elected, was ample. Now, the fifteenth section of the act to regulate commerce does in express terms provide that the Commission shall, upon finding a carrier in violation of any of the provisions of that act, order it to cease and desist therefrom. If this is equivalent to prescribing a rate for the future, it is within the express terms of the act itself, and therefore not open to the objection that the power has not been delegated. *What the practical effect of such an order may be, or whether it can be given any practical effect, remains to be seen.*" (Rec., 44.)

The substantial character of the order as a prescription of a maximum charge has not been altered, however, by first commanding that appellees "cease and desist from charging, collecting, demanding or receiving (in addition to their regularly published transportation charges) the sum of $2 per carload of live stock, as compensation for terminal services," and then merely "recommending" a $1 charge. Without this recommendation it might be claimed, perhaps, that the order means that no terminal charge what-

ever shall be made—on the theory, upon which the Commission repeatedly falls back in its opinion that the ordinary Chicago rate, in spite of the contrary declaration of the tariffs put in effect June 1, 1894, and ever since maintained, pays for transportation all the way to the Stock Yards, and that any terminal charge, however small in amount, is consequently a second charge laid for a service already paid for by the ordinary Chicago rate. If the order would bear such interpretation (*i. e.*, as forbidding any terminal charge whatever), it might not be open to the present jurisdictional objection, however erroneous for other reasons; because, in that event, it would not be a direction concerning the amount of future charge, but only a prohibition of (supposed) double charging for the same service.

But the order is actually directed against the amount of terminal charge—not against the mere fact of making any terminal charge, however small; and it prescribes that appellees, while allowed to make some terminal charge, must not charge as much as $2. This appears conclusively from the "recommendation" (which, of course, is permission) of a $1 charge. In view of this permission to charge $1, it is impossible to say that the order is anything else than a prohibition of a greater charge than $1; and so the order is, purely and simply, an attempt to prescribe a maximum charge for the terminal service.

3. Even the language of the Commission's order in this case is identical with the language of the Commission's order in the Cincinnati, New Orleans and Texas Pacific case, as found in 167 U. S., 481, 482. Let us quote the latter order, so far as here pertinent:

> "It is ordered and adjudged that the above named defendants, and each of them, engaged or partici-

> pating in the transportation of freight articles enumerated in the Southern Railway and Steamship Association classification as articles of the first, second, third, fourth, fifth or sixth class, do, from and after the 10th day of July, 1894, wholly cease and desist and thenceforth abstain from charging, demanding, collecting or receiving any greater aggregate rate or compensation per hundred pounds for the transportation of freight in any such class from Cincinnati, in the State of Ohio, or from Chicago, in the State of Illinois, to [various places named] than is below specified in cents per hundred pounds under said numbered classes respectively and set opposite to said points of destination—that is to say [then follows a schedule of places and figures]."

Wherein lies the difference between ordering appellees to desist from "charging the sum of $2.00 per car load," *i. e.*, as much as $2.00, and ordering the Cincinnati, New Orleans and Texas Pacific Company to desist from charging "any greater aggregate rate or compensation" than certain specified figures? If the latter order prescribes a maximum rate, why does not the former order do the same?

The orders of the Commission in this case mean exactly the same as if they read that appellees should not hereafter "charge more than $1 for the terminal service."

The Commission seems to ascribe some magical effect to the provisions of Section 15, that the Commission may order carriers to "cease and desist" from a course of unlawful conduct. These words, however, were in the Interstate Commerce Act when this court decided the cases in 167 and 168 U. S.; and the Commission's argument simply amounts to a criticism of this court's conclusion as to the Commission's powers. Counsel for the Commission relied upon these words of Section 15 in their argument of the Texas Pacific case (page 485); and these words were noticed, too, by the court itself (page 509). The application of Section 15 is to cases where the Commission is

given jurisdiction over the particular subject-matter, and the section merely regulates the procedure in such cases. As this court itself said, of this very section regarding procedure:

> "It will never do to make a provision prescribing the mode and manner applicable to all investigations and all actions equivalent to a grant of power in reference to some specific matter not otherwise conferred." (page 510.)

4. It is not to be overlooked that the prohibition under the Commission's orders against charging as much as $2.00 for the terminal service is absolute and unqualified. The orders forbid such charge—not merely so long as the flat Chicago rate is not reduced from what it was at the time of making the orders, nor so long as the rates to other live stock markets, like Omaha or Kansas City, are not raised, nor even so long as a similar terminal charge is not made at other live stock markets—but under any circumstances. The Commission's orders are not therefore a mere prohibition of an alleged discrimination (which would cease to be such if the Chicago general rate should be sufficiently reduced at any time, or if the rates to other live stock markets should at any time be sufficiently raised, or if a like terminal charge should at any time be imposed at other live stock markets); but these orders are an attempt to regulate the amount of the terminal charge by itself, and independently of any other circumstances, on the ground that the terminal charge is inherently too large. While the Commission may possess power to forbid a discrimination, that is not what it has sought to do in this case; for its orders would then have provided only that the terminal charge should not exceed $1 so long as the Chicago rates were not reduced, and the rates to other live stock markets were not raised, and a like terminal charge was not imposed at other live stock markets (such as Omaha

or Kansas City). If the trouble with the Chicago terminal charge were that it constituted a discrimination, the Commission's orders would be fatally erroneous for not giving appellees the option now or at any time hereafter to remove the discrimination—while continuing the terminal charge—by reducing the general Chicago rate, or by raising the rate to other live stock markets, or by imposing a similar terminal charge at other live stock markets.

The reason why the Commission's orders are absolute, and forbid the terminal charge unqualifiedly, is obviously that (as shown in the quotations in the preceding "Statement of Facts" from the Commission's findings) the Commission found the terminal charge not discriminatory except for the reason of its supposed inherent unreasonableness, and only to the extent of such unreasonableness, viz., $1.

The orders of the Commission thus palpably prescribe a future maximum rate (independent of changing circumstances) for the terminal service; and as such they are both literally and substantially such orders as this court held, in the cases cited from 167 and 168 U. S., to be beyond the Commission's power.

5. The fact that the order finds the terminal rate unreasonable to the extent of $1 and provides for further proceedings with a view to reparation will, of course, not suffice to justify the present proceedings in the courts, for the Commission cannot ask the courts to enforce its orders except as those orders may have been already violated. No reparation having yet been directed by the Commission, there has been no disobedience to any order of the Commission, except in the fact that appellees have declined to reduce the terminal charge. Indeed, there is as

yet no order of the Commission for the courts to enforce except the direction that appellees discontinue charging as much as $2 for the terminal service.

II.

THE TARIFFS PUT INTO EFFECT ON JUNE FIRST, 1894, AND SINCE MAINTAINED, CONCLUSIVELY OVERTHROW THE CONTENTION THAT THE $2 CHARGE, ESTABLISHED BY THOSE TARIFFS, IS A SECOND CHARGE IMPOSED FOR SERVICES WHICH APPELLEES HAD AGREED TO PERFORM FOR THE ORDINARY CHICAGO RATE; AND, INDEED, THE ORDERS OF THE COMMISSION HEREIN ARE THEMSELVES INCONSISTENT WITH THAT CONTENTION.

This question of double charging is wholly dependent upon the actual contract made between appellees and their shippers. It is entirely apart from any question of the reasonableness of appellees' charges. The terminal charge is not laid for a service for which appellees have already otherwise charged, unless appellees have agreed for a sum other than the terminal charge (*i. e.*, for the ordinary Chicago rate) to do the same service of carrying to and delivering at the Stock Yards for which the terminal charge itself is made. The question, therefore, depends upon appellees' tariffs, which have been effective since June 1, 1894. Have appellees in those tariffs offered to carry live stock to the Union Stock Yards and there deliver it for the ordinary Chicago rate; or have they, on the contrary, distinctly said that they would not carry live stock to the Union Stock Yards and there deliver it for the ordinary Chicago rate, and that this latter rate is applicable only to carriage and delivery of live stock on their own railroads in Chicago, without the additional service of carriage to the Stock Yards and delivery there?

1. The tariffs are explicit, and the construction of these written instruments is a question of law.

The Atchison Company's tariff, quoted and considered by the Court of Appeals in the *Walker* v. *Keenan* case (73 Fed. Rep., 755, 757), is a fair sample of all, and reads as follows:—

> "On and after July 9, 1894, a terminal charge of $2 per car will be made in addition to the Chicago rates, as shown in the tariffs of the Western Freight Association on live stock and other freight received from or delivered to the Stock Yards, or industries located on the tracks of the Union Stock Yards Railway or the Indiana State Line Railway; and $3 per car on shipments received from or delivered to the Northern Indiana Railroad at Hammond."

Others of the Atchison Company's tariffs, promulgated at different times to the same effect, will be found in Record, pages 198, 199, 205, 206.

The first of the North-Western Company's tariffs reads as follows:—

> "Taking effect June 1, 1894, the tariffs on live stock and all other traffic received from and delivered to the Union Stock Yards, and all industries located on the tracks of the Union Stock Yards Railway, the Indiana State Line Railway or the Northern Indiana Railroad at Hammond, Ind., will, in addition to the rates named to or from Chicago, be subject to a terminal chage of $2 per car.
>
> This charge must in all cases be added to the through rate, and must be shown separately on the way-bill as miscellaneous earnings and a delivering expense; it must also be provided for and shown in contracts and bills of lading." (Rec., 196.)

All the other tariffs are to the same general effect. They vary immaterially in wording, and only enough to illustrate that they are ordinary business instruments, written by business men in a popular way, and not by lawyers, and are entitled accordingly to common sense treatment.

What is the fundamental thing that these tariffs declare? Unmistakably, that after their promulgation appellees would not carry live stock to the Union Stock Yards and deliver it there for the ordinary Chicago rate, but would insist upon $2 more than the Chicago rate, as a charge for the service of carrying the live stock over the Stock Yards tracks and delivering it at the Stock Yards. Popular, untechnical language could not make the matter clearer. Appellees distinctly said by these tariffs that they would charge $2 more than the ordinary Chicago rate for carriage to and delivery at the Stock Yards; and that is the same thing as saying that they would not thereafter carry to and deliver at the Stock Yards for the ordinary Chicago rate alone.

2. These tariffs, in force since June 1, 1894, alter the whole situation radically from what it was before that date. It may be admitted that before these tariffs went into effect appellees did, in fact, deliver live stock at the Stock Yards for the ordinary Chicago rate; but the whole purpose of the new tariffs put into effect June 1, 1894, was to alter that situation. The Commission has insisted upon looking at things as they were before the tariffs; while the questions in this case concern the time since the tariffs. Here lies the Commission's root trouble; and it is unnecessary to argue that the construction and effect of the written tariffs is matter of law, on which any view of the Commission would be subject to revision by the courts.

3. The Commission's own order is inconsistent with the theory of double charging, and rests unavoidably upon the fact that after June 1, 1894, the ordinary Chicago rate no longer paid for transportation to and delivery at the Stock Yards. The Commission, as has been already seen, allow appellees to make a charge of "$1 per carload as compensation for terminal or switching services rendered in the de-

livery of live stock at the yards of the Union Stock Yards and Transit Company" (Rec., 47); whereas no charge whatever could be made for these terminal or switching services if, in spite of the tariffs adopted June 1, 1894, the ordinary Chicago rate itself paid for such services. It results, therefore, from the very nature of the Commission's own order, that it is not open to appellant to dispute the fact that no part of the terminal or switching services, rendered beyond appellees' own rails, in getting live stock to the Stock Yards and there delivering it, is paid for by the ordinary Chicago rate.

4. While the views of the Circuit Court and of the Court of Appeals have no conclusiveness here, the interpretation of the tariffs by those courts is certainly weighty in support of the idea that the tariffs did what, undoubtedly, they were meant to do, viz., declare to the public that after their adoption the ordinary Chicago rate would not apply to transportation beyond appellees' own roads to the Stock Yards.

Not only did both the Circuit Court and the Court of Appeals in terms construe the tariffs as forbidding the claim of double charging, but such was the necessary ground of their decisions, for otherwise no terminal charge of any amount could be proper.

III.

THE TERMINAL OR SWITCHING CHARGE ESTABLISHED BY THE TARIFFS IN FORCE SINCE JUNE 1, 1894, IS FOR THE SERVICE OF CARRYING LIVE STOCK TO THE STOCK YARDS OVER THE TRACKS OF THE STOCK YARDS COMPANY (AND IN THE CASE OF THE GREAT WESTERN, THE BURLINGTON, THE MILWAUKEE AND ST. PAUL, AND THE ATCHISON COMPANIES OVER THE TRACKS ALSO OF OTHER RAILROADS INTERMEDIATE BETWEEN SUCH APPELLEES' OWN TRACKS AND THE STOCK YARDS COMPANY'S TRACKS) AND OF DELIVERING AT THE STOCK YARDS, FROM TWO TO NINE MILES AWAY FROM APPELLEES' OWN TRACKS; WHILE THE ORDINARY CHICAGO RATE HAS APPLIED, SINCE JUNE 1, 1894, ONLY TO TRANSPORTATION UPON APPELLEES' OWN RAILROADS, WITHOUT THE FURTHER SERVICE OF CARRIAGE TO AND DELIVERY AT THE STOCK YARDS.

THIS ESTABLISHMENT OF DISTINCT CHARGES FOR WHOLLY DIFFERENT SERVICES—ON THE ONE HAND, OF ORDINARY TRANSPORTATION ON APPELLEES' OWN ROADS; AND, ON THE OTHER HAND, OF CARRYING OFF APPELLEES' ROADS, TO THE STOCK YARDS, AND MAKING DELIVERY THERE—WAS REASONABLE AND LAWFUL UNDER THE CIRCUMSTANCES OF THE CASE, AND HAS MANY SUBSTANTIAL ADVANTAGES, BOTH TO APPELLEES AND TO THE PUBLIC.

Under this general head should be considered:

First. The meaning of appellees' tariffs, with reference to the question for what services the terminal or switching charge is made.

Second. The general right of a railway carrier, in view especially of the Interstate Commerce Act, to make a separate charge for a distinct, special service, instead of making a single, aggregated charge for the total of all its services.

Third. The propriety of a distinct charge for the special service of carrying live stock to the Union Stock Yards and there delivering it, under the particular circumstances of this case.

First. The two dollar charge is made under the appellees' tariffs for the special service of carrying from appellees' own roads to the Union Stock Yards, and there making delivery.

1. The immediate historical occasion of the $2 charge indicates that it applies to the service beyond the junction point of appellees' own rails with the rails of other companies running to the Stock Yards, It is quite correct that this $2 charge was first established when in June, 1894, the Union Stock Yards Company first imposed a trackage charge varying from eighty cents to $1.50 per car (beside its previous and still continued unloading charge of twenty-five cents per car); and this trackage charge was for the use by appellees of the rails of the Stock Yards Company running from their junction points with appellees' roads to the Stock Yards. Initially, therefore, we should expect the $2 charge to relate to the same distance.

2. The $2 charge is variously called in the tariffs a "terminal charge" (*e. g.*, Rec., 195, 198, 207, 208, 213, 214) or a "delivering expense" (Rec., 196, 198, 213, 214); but the ever-present statement is that the charge is to be collected on live stock going to the Stock Yards, and not to be collected on live stock which does not go there. Accordingly, the charge is laid for the peculiar service of getting to the Stock Yards, which is not involved if the stock does not go there; *i. e.*, for the service over the rails of other companies from their junction with appellees' own railroads.

3. The Commission recognizes and decides that the $2 charge is laid for the service beyond the point of leaving the appellees' own roads.

(*a*) Otherwise, the Commission's elaborate inquiry concerning the cost of hauling from the junction points with appellees' railroads to the Stock Yards would have been irrelevant. (Rec., 25–27.)

(*b*) The charge is compared by the Commission with other switching charges, thus—

> "If the charge for this terminal service is to be regulated by what is ordinarily charged for switching, the present charge is a reasonable one. The testimony showed that it seldom happened that a lower switching charge than $2 was made, and that this amount was often exceeded." (Rec., 27.)

(*c*) The Commission's ultimate finding that the charge is reasonable in amount recognizes it as being for the terminal service from the point of leaving appellees' own roads; this finding being—

> "To remove all doubt upon that subject, however, if it is not clearly found, we now find that looking entirely to the cost of service and including as a part of that cost the trackage charge paid to the Union Stock Yards and Transit Company and the unloading charge paid that same company, the amount of this terminal, if under the circumstances of this case it is proper to impose the charge, is reasonable." (Rec., 49.)

This shows that the Commission treated the charge as laid for both the hauling and the delivery services after leaving appellees' roads.

(*d*) The "recommendation," in the Commission's order, that appellees make a terminal charge of $1, instead of $2, was based upon the Commission's idea that the appellees might properly reimburse themselves for the trackage charge, of varying amounts from 80 cents to $1.50 per car, imposed by the Stock Yards Company. Thus the Commission said—

"They may reimburse themselves for whatever they are compelled to actually disburse in the way of trackage charges to the Union Stock Yards and Transit Company. That company is, apparently, entirely independent of the railway companies. They cannot and do not in any respect control its charges. This particular charge seems to have been exacted from them in opposition to the most earnest protest. It does not seem just, therefore, to compel them to absorb this charge." (Rec., 43.)

Again, the Commission said—

"We have found that to the extent of $1 a new condition did justify the additional charge, for the reason that then for the first time the Stock Yards Company exacted this trackage charge." (Rec., 50.)

This new trackage charge of the Stock Yards Company, however, could not justify, *pro tanto*, appellees' terminal charge of $2, unless the trackage charge constituted an expense which appellees' $2 charge was laid, among other purposes, to cover.

(*e*) The statements quoted in the last paragraph show that the recommendation in the Commission's order, that appellees make a $1 terminal or switching charge, involves a recognition and finding on the part of the Commission that the $2 charge was established by appellees in order to obtain compensation for the labor and expense of the service of getting live stock to the Stock Yards after its departure from appellees' own roads and of delivering stock at the Stock Yards.

4. The views of the Circuit Court and of the Court of Appeals agreed with the finding of the Commission on this point that the $2 charge made by appellees' tariffs since June 1, 1894, is for the service of of transporting live stock to the Stock Yards over the tracks of the Union Stock Yards Company and of other companies, after leaving appellees' own tracks, and of then delivering the live stock to the Union Stock Yards.

In the Keenan case (73 Fed. Rep., 755), the court said by Judge SHOWALTER, concerning the shipments from Kansas City there involved—

> "The 23½ cents per hundred weight (being the ordinary Chicago rate in that case) pays these appellants for hauling from Kansas City to a station or point on their line in Chicago; the $2 per car pays for the transfer thence to the Stock Yards, where the consignees desire the delivery to be made." (p. 762.)

In the Circuit Court Judge KOHLSAAT held, likewise, that appellees effected

> "A segregation of their freight charges from Missouri river and other stock shipping centers to the Chicago Stock Yards, so that the Chicago rate did not include the expenses or charges incurred in the delivery at the Stock Yards from tracks of the defendants, and did make a special rate from their tracks to the Stock Yards."

This quotation will be found accurately to state Judge Kohlsaat's position. (Rec., 252, 253.)

Second. A railway carrier, in the absence of statutory prohibition, is entitled to make a separate charge for a distinct, special service, instead of making a single aggregated charge for the total of all its services. The limitation upon this privilege, doubtless, is that the subdivision of charges shall not go to the length of unreasonableness. The Interstate Commerce Act recognizes and confirms this right of apportioning separate charges to different services.

1. At the outset it should be noticed that the Commission does not question the right of appellees to make a separate charge for the special service of getting to the Stock Yards and there delivering. On the contrary, it allows $1 for this service. Nor have the Commission's attorneys attacked the general right of making a distinct charge for a special and peculiar service. The idea and

claim of the Commission and its attorneys are merely that because appellees made no charge before June 1, 1894, they ought not now to charge more than $1. Apology is, perhaps, due for going into a discussion of the question when such is the Commission's attitude.

2. The right to make separate items of charge for separate items of service must certainly be admitted to exist, when there is nothing unreasonable in the subdivision, and when no statute forbids it. If the subdivision of services and charges should become so minute or so arbitrary in any instance as to be unreasonable, it would doubtless be violative of the general requirement made concerning carriers, in the interest of the public welfare, that their conduct, and particularly their charges shall be reasonable. But this very limit which the law would doubtless put upon the action of a carrier in the way of itemizing its charges for different portions of its service affords the best reason in the world why the privilege of itemized charging, which the rest of the world possesses; and which, undeniably, is promotive of fair charging and of good undertsanding and feeling about charges, should not be denied to carriers; for any possibility of abuse in the practice, through carrying it too far, is removed by the law's inhibition of unreasonableness in a carrier's methods.

This court, speaking by Mr. Justice BREWER, in a case under the Interstate Commerce Act, adopted with approval the following language of Mr. Justice JACKSON:

> "Subject to the two leading prohibitions that their charges shall not be unjust or unreasonable, and that they shall not unjustly discriminate, so as to give undue preference or disadvantage to persons or traffic similarly circumstanced, the act to regulate commerce leaves common carriers as they were at the common law, free to make special contracts looking to the increase of their business, to classify their

> traffic, *to adjust and apportion their rates* so as to meet the necessities of commerce, and *generally to manage their important interests upon the same principles which are regarded as sound, and adopted in other trades and pursuits.*"
>
> *Interstate Commerce Commission* v. *C. N. O. & T. P. Ry. Co.*, 167 U. S., 479, 493.

These words are most apposite to the point now in hand. The present case illustrates their wisdom. There are reasons in abundance why the special service of getting live stock to the Union Stock Yards should be the subject of a separate charge, and these reasons will later be suggested. In the present connection it should be said that no principle is regarded as more sound or is adopted with better results "in other trades and pursuits" than that of itemized charging in the interest of definiteness, honesty, good understanding and good feeling; that there is every reason for extending that principle, within reasonable limits, to the business of a railway carrier; and that any danger of abuse of the principle is obviated as to the business of a railway carrier, by the established rule that the conduct and charges of such a carrier must be reasonable, and not oppressive.

3. There is no novelty in distinct charges for special parts of a railway's services. They have long been common, both in this country and in England. It is enough to refer to "bridge charges," "ferry charges" and "switching charges," as extensive and important types of such charges in the United States.

Take the St. Louis bridge, for example, which we understand to be owned by a distinct corporation, which charges tolls for use of the bridge by the railroads connecting with it. Would anybody contend that a railway company receiving freight at some shipping point in the region west of the Mississippi river for delivery at East St. Louis (on

the east side of the Mississippi river), could not by proper statements in its tariff so far itemize its charges on the stated shipment as to make a "flat St. Louis rate" and a separate charge for taking the shipment across the bridge and delivering it in East St. Louis, provided the charges were of reasonable amount? The bridge charge in this case would be merely reimbursement to the railway company for the trackage charge it would have to pay the bridge company and for the cost of the service on the bridge, with the addition of a fair profit. Bridge charges like these are made, and always have been made, throughout the United States; they are undistinguishable from the $2 charge made in the present case and if appellees' $2 charge cannot be sustained, "bridge charges" over the whole country will likewise fall.

Consider for a moment, also, the case of "switching charges," which are about as well-known and thoroughly established as anything in American railroading. They are likewise separate charges; and they are laid for the special service of carrying freight to special delivery points where the consignee may desire it delivered for any one of a hundred different reasons, such as the location of his factory there, or the existence at that point of a side-track convenient for the consignee's use, or the abliity of another railway company to get the freight at such point. "Switching charges" are quite as often made by the company which has hauled the freight to the place where the special service begins for which the "switching charge" is made, as they are by a second company which does only the special service. The identity or difference of company can, of course, make no difference, if the other circumstances are alike. The delivery service for which "switching charges" are laid often involves a haul over two or three or more miles of track. They are in every respect like the service for which appellees make their $2 charge;

with the single exception, which makes the case for this $2 charge even stronger, that the appellees have no proprietary interest in or control over the tracks which they use in getting live stock to the Stock Yards, and traverse those tracks merely under an individual car license. Is the system of "switching charges" also to be abolished, if appellees' $2 charge is unlawful, on the theory that it should have been included in a single aggregate rate, instead of being made a distinct charge for a definite and special service?

In England the system of separate items of charge for different parts of a railway company's services is carried to great length, and has always been deemed of the utmost public advantage.

(1) Separate charges are not only made, but are prescribed by statutes, for the mere use of the railway as a highway (the cars and locomotive service being supplied by the shipper himself); for the use of cars; and for the locomotive or hauling service. The system contemplates an opportunity to the shipping public to take one or more of these three services at the hands of the railway company, according to the shipper's interest. The three stated elements of an ordinary transportation constitutes what in the English statutes is termed "conveyance"; and besides these three charges there are other separate charges for such services as the railway company may do in the character of "carrier," as distinguished from mere "conveyor." The subject has its final and authoritative general exposition in the case of

Hall & Co. v. *London, Brighton & South Coast Railway Company*, 5 Browne & MacNamara's Railway and Canal Traffic Cases, 28.

The statute pertaining to the London, Brighton and

South Coast Railway Company (26 and 27 Vict., Ch. 218), considered in the case just cited, will be found at length in

1 Hodges' Law of Railways (7th Ed.), 456, 459.

After prescribing separate rates for the separate elements of a conveyance, in accordance with the general system just described, Section 51 places a limit upon the total of such three kinds of charge, in the event that the railway does the entire conveying; and this section reads as follows:

> "The maximum rates of charges to be made by the company for the conveying of animals and goods, including the tolls for the use of their railways or waggons or trucks and for locomotive power, and every other expense incidental to such conveyance, (*except a reasonable sum for loading, covering and unloading of goods at any terminal station of such goods, and for delivery and collection, and other services incidental to the duty or business of a carrier, where such services or any of them are or is performed by the company*), shall not exceed the following sums, that is to say:"

The italicized clauses, in parenthesis, are the portion concerning services other than conveyance; and in the Hall case these clauses were held to include, *prima facie* (and subject to determination on the particular facts of each case), "station accommodation, the use of sidings, weighing, checking, cartage, watching and labelling," so that, of course, separate charges could be made for any of these. The Hall case did not determine these to be the only extra services, but simply answered an inquiry of the Railway Commission concerning the stated services.

The English "Model Railway Bill" is a general form prescribed by statute for bills offered in Parliament for enactment; and, as amended in 1888, this form of bill is found in

2 *Hodges on Railways*, 438–451.

This bill form is nearly identical in wording with the old London, Brighton and South Coast Company's act and is equivalent in substance; continuing, therefore, to the present time, in a general way, the same policy about separate charges.

(2) Another English statute of much significance is:

Regulation of Railways Act, 1868 (31 *and* 32 *Vict., Ch.* 119), *Section* 16.

It is there provided that in case of use of any steam vessel owned by the railway company for carriage over any part of the railway company's route

> "Where an aggregate sum is charged by the company for conveyance of a passenger by a steam vessel and on the railway, the ticket shall have the amount of toll charged for conveyance by the steam vessel distinguished from the amount charged for conveyance on the railway."

This is an instance of subdivision of charges for different geographical parts of a continuous carriage when the vehicle is changed.

(3) The policy of England is most emphaticaly apparent in the statutory provisions which have existed now for perhaps forty years, entitling any shipper, in case the railway company does not itself voluntarily itemize its different charges, to require such itemization. The chief examples of these statutes follow:

The Regulations of Railways Act of 1868 (31 *and* 32 *Vict., Ch.* 119), *Section* 17; *found in* 2 *Hodges on Railways*, 281.

This section reads:

> "Where any charge shall have been made by a company in respect of conveyance of goods over their railway on application in writing within one week after the payment of the said charge made to the secretary of the company by the person by whom or

on whose account the same has been paid, the company shall within fourteen days render an account to the persons so applying for the same, distinguishing how much of the said charge is for the conveyance of the said goods on the railway, including therein tolls for the use of the railway, for the use of carriages and for locomotive power, and how much of such charge is for loading and unloading, covering, collection, delivery and for other expenses, but without particularizing the several items of which the last mentioned portion of the charge may consist."

The next similar enactment is:

Regulation of Railways Act, 1873 (36 *and* 37 *Vict., Ch.* 48), *Section* 14; *found in* 2 *Hodges on Railways*, 309, 310.

This reads:

"The commissioners may from time to time on the application of any person interested make orders with respect to any particular description of traffic, requiring a railway company or canal company to distinguish in such book how much of each rate is for the conveyance of the traffic on the railway or canal, including therein tolls for the use of the railway or canal, for the use of carriages or vessels, or for locomotive power, and how much is for other expenses, specifying the nature and the detail of such other expenses."

The latest statute on the subject is:

Railway and Canal Traffic Act, 1888 (51 *and* 52 *Vict., Ch.* 25), *Section* 33, *clause* 3; *found in* 2 *Hodges on Railways*, 357.

This reads:

"The company shall within one week after application in writing made to the secretary of any railway company by any person interested in the carriage of any merchandise which has been or is intended to be carried over the railway of such company, render an account to the person so applying in which the charge made or claimed by the company

> for the carriage of such merchandise shall be divided, and the charge for conveyance over the railway shall be distinguished from the terminal charges (if any), and from the dock charges (if any), and if any terminal charge or dock charge is included in such account, the nature and detail of the terminal expenses or dock charges in respect of which it is made shall be specified."

In allowing the public to require such itemization of charges, these statutes, of course, permit the railways voluntarily to itemize; and they show how the English policy in favor of distinct charges for different services has stood the test of forty years' experience or more; has been extended, instead of being narrowed; and has been more and more emphatically announced.

As respects certain points of detail, these statutes show:

(*a*) A right to divide even "conveyance" charges—either as to different elements of the conveying service, such as use of way, use of cars and locomotive work; or as to different geographical parts of the conveyance, even though those parts be intermediate, instead of terminal—(at any rate, if there be some good reason for such division, as in the cited statutory instance of change from train to boat in a continuous journey).

(*b*) A most extensive right (which, indeed, is apparently unlimited, save, of course, by the two rules that the two charges must not overlap, and that the prescribed maximum conveyance charges must not be exceeded) to lay separate charges for all services of special character, including not merely strict terminal charges (such as "station accommodation, use of sidings," etc., mentioned in the Hall case), but equally charges for all services "incidental to the duty or business of a carrier."

In their bearing upon American law, the English statutes and decisions on this subject must certainly suffice to show:

(*a*) That no public policy forbids any subdivision of charges, so as to apportion the items of charge to different services, unless that subdivision goes to the extent of unreasonableness, and accordingly violates the fundamental rule that all a carrier's conduct, and particularly its charges, must be reasonable.

(*b*) Likewise, that it is entirely reasonable, and indeed best, to make distinct charge for such special services as by reason of their character or their conditions or their peculiar cost possess what may, perhaps, be described best as a certain natural distinctness. No general rule can be advanced for determining, by strict definition, what are and what are not such special services, but the question of reasonableness in this instance, as in its multifarious other applications in the law, will have to depend upon the particular circumstances of each case.

4. In spite of the long duration and large extent of the practice of making separate special charges for special services, no case is cited in condemnation of it and no statute has ever been enacted against it. If the numerous examples of the practice in the United States, some of which have already been indicated, had caused public friction or been deemed unjust, individuals would not so long have stayed out of the courts, and there would not have been complete absence of any attempts at restrictive legislation.

5. The argument from public policy is too vague, as well as too late. Where is the evil that is to be expected, notwithstanding the undoubted restriction of the practice within the bounds of reasonableness? Why has not this evil been discovered in the long years that have passed since the practice began? Public policy must be plain, beyond any fair doubt, to justify such tardy and sweeping restriction of the same liberty on the part of carriers as the

rest of the world admittedly enjoys, and, such as, undeniably, instead of being immoral, conduces to openness and fairness of conduct.

What is urged against the separation of this $2 charge, except that some day, under *other* circumstances, the practice may, perhaps, be carried too far? When it is, the law will check it as an unreasonable abuse; and, beside that, there is not the remotest practical likelihood of any attempt at abuse. If it is to be feared in the future, why has it not occurred in the past? Plainly enough, because railway carriers in this country have nothing to gain and everything to lose from unfair and oppressive methods. Under a system of unrestricted (or, as it may well be called, untempered) competition, such as prevails between the railways in this country, no railway can afford to take a burdensome course with its patrons; for, if it should, it would speedily lose them.

It being apparent enough that supposed possible inconvenience from the practice of subdividing charges is imaginary—because wholly vague and unexplained, never heretofore found in experience, positively refuted by English practice, practically most unlikely under a system of the keenest competition, and legally preventable as unreasonable—let us recapitulate some leading advantages of the practice:

(1) It shows, in an accurate and really informing way, the exact service for which a charge is made; and so tends to fairness of charge and to a better understanding and feeling.

(2) The reasonableness of the items of charge can be much more definitely and reliably tested.

(3) Shippers who do not desire all the services that under a system of undivided charges would, together, form the basis for a single aggregate charge, are given the op-

portunity to avoid such items of charge as are for services not needed by those shippers.

(4) The last feature of the matter shows that the practice of reasonably divided charges is really necessary for avoidance of those discriminations between shippers which it is the most solicitous effort of recent railway enactment to prevent; for a shipper who does not wish all the services for which an aggregate rate may be made will often have to pay for undesired services, unless itemized charges for distinct parts of the service are made; and in so far as he will thus be compelled to pay for services that he does not need, he will suffer a discrimination in favor of shippers who do want all the services on which the aggregate rate is based. In this case, why should a shipper who wishes to have a carload of live stock delivered on appellees' own tracks in Chicago, have to pay an aggregate rate large enough to include compensation for the carriage to and unloading at the Union Stock Yards?

On this question of public policy it ought, perhaps, to be added that, while no reason appears for condemning a system of reasonably divided charges on passenger traffic (at any rate if, as is always the case, the passenger is permited to pay the total of the charges in one sum), yet the rule may well enough be different as to passengers and freight; and, in fact, is different in England. (See language of Mr. Justice Wills, on page 36 of Hall opinion, 5 B. & M. Railway & Canal Traffic Cases).

6. The Interstate Commerce Act in no way lessens the common law liberty of carriers in respect of dividing their charges; but, on the contrary, recognizes and confirms it. The following quotations from the act will suffice to show this:

> "The schedule printed, as aforesaid, by any such common carrier shall plainly state the places upon its

railroad between which property and passengers will be carried, and shall contain the classification of freight in force, *and shall also state separately the terminal charges, and any rules or regulations which in any wise change, affect or determine any part or the aggregate of such aforesaid rates and charges.*"

* * * * *

"And when any such common carrier shall have established and published its rates, fares and charges in compliance with the provisions of this section, it shall be unlawful for such common carrier to charge, demand, collect or receive from any person or persons a greater or less compensation for the transportation of passengers or property, *or for any service in connection therewith*, than is specified in such published schedule of rates, fares and charges, as may at the time be in force."

Section 6, *as amended March* 2, 1889, *Supp., Rev. Stats., pp.* 684, 685.

"All charges made for *any* service rendered, or to be rendered, in the transportation of passengers or property as aforesaid, *or in connection therewith, or for the receiving, delivering, storage or handling* of such property shall be reasonable and just."

Section 1 (*Supp. Rev. Stats., p.* 529.)

"That it shall be unlawful for any common carrier subject to the provisions of this act to charge or receive any greater compensation *in the aggregate* for the transportation of passengers or like kind of property under substantially similar circumstances and conditions for a shorter than for a longer distance over the same line," etc.

Section 4 (*Supp. Rev. Stats., pp.* 530.)

It will be noticed, in the first place, that there is absolutely no restriction upon separate charges to be found anywhere in the statute. This would be enough to leave the common law operative.

In the second place, the affirmative recognitions of the

practice of separate charges are as ample as they well could be. Thus:

(1) The sixth section, while particularly mentioning terminal charges, refers in a much larger way to "any part or the aggregate" of a company's charges; and, indeed, it is the "rates and fares and charges *for the transportation* of passengers and property" which this section indicates may be divided, when it speaks of "any part or the aggregate of such aforesaid rates, and fares and charges"; for the "aforesaid" rates and fares and charges are those mentioned in the first paragraph of the section for transportation. The special mention of terminal charges in this section, without enumeration of other special charges, undoubtedly results from the fact that those words ("terminal charges") are here used in the wide sense of including all other charges than transportation charges—about which latter, as well as terminal charges, the statute says the tariffs must "separately" state "any rules or regulations which in anywise change affect or determine any part or the aggregate." If, therefore, a company determines any part even of a transportation charge by special regulation concerning that part, the tariffs are required to separately state such part; and this seems to make it manifest that even an ordinary transportion charge can be subdivided here, as in England.

(2) The mention in the same sixth section of charges "for any services in connection therewith," *i. e.*, with transportation, again directly contemplates such charges as distinctly stated. This phrase, as used in this section, is certainly wide enough to include any service outside of what the company charges for in its ordinary transportation rates..

(3) The same mention is made of services connected with transportation, as being something different from

ordinary transportation, in the quoted paragraph of the first section of the act.

(4) The fourth section speaks of an "aggregate" of charges "for the transportation" of passengers or property. An aggregate is the result of a summation of parts, and therefore recognizes the existence of parts. Unmistakably, therefore, this fourth section contemplates subdivision even of strict transportation charges.

In the third place, attention may again be called to the fact that reasonable subdivision of charges is accordant with, and positively necessary to, the fundamental policy of the statute in forbidding discriminations; because only by such subdivision can shippers who do not desire or receive particular services avoid having to pay for them in an aggregate rate charged to other shippers who do desire and receive such services.

Beside imposing no restrictions, the Interstate Commerce Act, accordingly, seems to affirmatively recognize

(1) The right even to subdivide transportation charges under circumstances making it reasonable.

(2) The right to make separate charges for any special services "connected with transportation."

(3) The right to make separate terminal charges of different sorts.

This full subdivision of charges is likewise in fundamental harmony with the act's policy in seeking full, accurate and practically available information to the public about all a carrier's transactions, and particularly its charges; beside being of the utmost value in helping forward the practical administration of the statute in its requirement of reasonable rates.

7. There is nothing in the Covington Stock Yards case (139 U. S. 128) in denial of the right to make a distinct charge for a special service performed by a railway for a shipper.

(1) There was no attempt to separate the terminal charge in that case from the general transportation charge. The railway established a single, entire rate for the general service of carrying to Covington; and that rate of course, in the absence of separate statement in the company's rate sheets or in the shipping contract that a terminal charge would be made for unloading at Covington, beside the general transportation charge, included the service of unloading and delivering at the end of the transportation, just as it included the service of receiving the stock at the beginning of the transportation. Nobody can contend that a general transportation charge does not include the initial receiving service and the terminal delivering service, when it is not stipulated otherwise in the contract. Accordingly, the attempt to levy the unloading charge in this Covington case was an effort to make a second charge for a service which the railway had contracted to do for the general rate alone. In other words, the Covington case was one of attempted double charging; while in this case there is no double charge, because the tariffs distinctly state that the company will not carry to the Stock Yards and there deliver for the ordinary Chicago rate. (Point II, *supra*.)

Mr. Justice HARLAN said, in the opinion in the Covington case, that the contention of the railway was

> "in effect that the carrier *may without special contract for that purpose* require the shipper or consignee in addition to the customary and legitimate charges for transportation to compensate it for supplying the means and facilities that must be provided by it in order to meet its obligations to the public. To this proposition we cannot give our assent." (Page 134.)

This is a distinct indication on the part of the court that the case might be very different where it is stipulated in advance, by tariff or by shipping instrument, that the ordinary rate shall not include the delivery service, and that a separate charge will be made for the latter.

(2) Keith, the petitioner in the Covington case, at whose instance and for whose benefit the court's order was made, did not desire to have his stock unloaded through the Covington Stock Yards; and the railway and stock yards company were attempting to make Keith pay for a service at the stock yards which Keith did not need. Keith had constructed cattle yards of his own, separated only by the width of a street from the "Covington Stock Yards," and adjoining a switch track of the railway company. With the consent of the railway company he had also constructed platforms and chutes connecting his yards with the side track. After he had had his stock delivered through his own chutes and yards for some time, the receivers of the railway company removed them, in furtherance, undoubtedly, of the attempt to make him pass his stock through the Covington Stock Yards and pay charges therefor. This was an unlawful effort to deprive Keith of his own facilities for unloading stock, in practically the same place as the Covington Stock Yards. How could the railway take advantage of its own wrong in removing Keith's chutes and yards to compel Keith to send his stock where he did not wish them to go?

Judge Showalter (in the Keenan case) presented these aspects of the Covington case very clearly:

> "Keith was the owner of appropriately constructed cattle yards separated by the width of the street from the yards of the Covington Stock Yards Company, and adjoining a switch track of the railway company. He had constructed or provided, apparently by the

license of the railway company, express or implied, platforms, chutes and enclosures connecting his yards with the side track. For a time subsequent to March 1, 1886, all cattle consigned to Keith or his firm of Keith & Wilson, who were dealers in cattle on commission, were unloaded into Keith's cattle yards; but prior to the 18th of June, 1886, the receivers caused Keith's appliances for loading and unloading to be removed from their tracks. Keith was thereafter compelled to accept delivery of cattle consigned to his firm through the yards of the Covington Stock Yards Company, and was thus obliged to pay 60 cents per car for a service which without inconvenience either to the public or the railway company he was prepared to dispense with; hence, his intervening petition. The court ordered the receivers in the event that they or their agent in that behalf, the Covington Stock Yards Company, should choose not to permit Keith thereafter to take his cattle through their yards without the 60 cent charge, to allow him to replace his platforms and chutes and to unload and deliver to him thereat (he or some agent employed by him being then present to take charge of such cattle) all cattle consigned to him or to his yards." (pp. 758, 759.)

The order in this Covington case was merely that Keith's live stock be delivered through the Covington Stock Yards without further charge, "*upon the consent of such stock yards in writing that it may be so done being filed in this court*" (Page 132 of the Supreme Court opinion); and that in default of such consent by the stock yards company Keith might restore his chutes and platforms and have his stock delivered there, as they were before they were wrongly removed. It thus becomes apparent that what Keith was adjudged entitled to was delivery on his own premises, and that delivery without charge through the Covington Stock Yards was ordered, in the event of consent to that course by the Stock Yards Company, simply as a practical equivalent for Keith's own chutes and yards which had been taken away from him; and the equivalence of the two things arose from the fact that

Keith's yards and the Covington Stock Yards were both at the same point.

Judge Showalter adverted to this feature likewise:

> "The learned counsel for appellee treat the Covington case as a pronouncement by the Supreme Court that the receivers there must forego the 60 cents per car and let Keith's cattle be delivered through the Covington Stock Yards unconditionally. On the contrary, the essential and central fact upon which the judgment went was, as already explained, that Keith's yards adjoined the track, and he had without hurt to the railway company or to the public and apparently by the license of the comyany provided the means of unloading into his own yards. He had no occasion to avail himself of the service of and the instrumentalities provided by the Covington Stock Yards Company, the concern which had assumed to that extent the duty of the carrier; hence the order that his cattle must either be loaded into his own yards, or else pass free of charge through the yards controlled by the Covington Stock Yards Company for the railroad. *If the rule of law had been as counsel for these appellees contend, then the order would have been that Keith's cattle be unloaded free of charge into the yards used by the railroad company without any alternative.*" (Page 761.)

(3) The Interstate Commerce Act was enacted in 1887, after the controversy in the Covington case arose (in 1886); the sixty cent charge of the Covington Stock Yards Company was an unloading charge; and, even if the Covington case had disapproved separate charges for special services, the rule would now be different under the Interstate Commerce Law. Unloading is one of the very things enumerated in Section 1 of the act as a special service, the charge for which Section 3 requires to be separately stated.

Third. A distinct charge for taking live stock to the Union Stock Yards and there delivering it is altogether reasonable and proper, in view of the circumstances.

It will be unnecessary, after the previous discussion of the common law, the English statutory system and the Interstate Commerce Act, to go into any critical inquiry concerning the proper name of this charge—whether it should be called a terminal charge, or a delivering charge, or a switching charge, or a charge for some other form of special service. This is so because, whatever name be given it, the circumstances show it to be proper in all three of the following aspects:

(1) As a charge which it is reasonable to make distinct, under the common law rule of reasonableness.

(2) As a charge such as the English statutes would permit to be separately made.

(3) As a charge which, being either a terminal charge or at least a charge for a service "connected with transportation," the Interstate Commerce Act affirmatively recognizes as a proper separate charge.

1. This $2 charge made by appellees has been seen to be laid for a special service over tracks in which no one of appellees has the slightest proprietary interest and over which none of them has the slightest control, in going a distance of from two to nine miles to a stock yard which is equally outside the interest and beyond the control of appellees, and of there delivering live stock. The Union Stock Yards Company makes appellees pay a special charge for the use of these tracks; and this charge is of a certain amount per car (varying from 80 cents to $1.50). Appellees, therefore, enter the tracks only under a mere single car license. The Union Stock Yards Company could forbid appellees using the tracks, or could raise its

trackage charges, any day that it might so desire. This trackage charge made against appellees is even beyond the jurisdiction of the Interstate Commerce Commission or of any other tribunal, as to its reasonableness, for it is not a carrier's charge, but a mere compensation for the use of property, which the Stock Yards Company, as owner, may resume to itself, unless it can get its own price. Beside the trackage charge, the Stock Yards Company likewise makes appellees pay an unloading charge of 25 cents per car; and that is embraced, with the trackage charge and the cost of appellee's own service upon the Stock Yard's tracks, in the $2 charge. The reason why appellees enter upon this extraordinary service, under its unusual conditions, is that the Union Stock Yards have grown to be a most important live stock market; and accordingly shippers are commonly anxious to get their stock there, notwithstanding the fact that appellees have no means of access by tracks of their own. This anxiety of most shippers to get their live stock to the Union Stock Yards is no reason, however, why other shippers, even though they be few, should not have the right to have their live stock delivered on appellees' own tracks, if they so desire, without being compelled to pay a lump rate to Chicago, based in part upon the cost of this special service to the Stock Yards; and separation of the cost of getting to the Stock Yards, by making it a separate item of charge, as appellees have done, is an appropriate way of saving such shippers from any expense on account of the peculiar Stock Yards service.

The reasonableness of a separate charge under the indicated circumstances is sufficiently plain. Indeed, the Commission itself recognizes that reasonableness; for the Commission's order in this case calls for a separate charge of $1. It is only the amount of the charge, therefore,

and not the fact of separate charge, with which the Commission quarrels.

2. Some pertinent English cases will show that this $2 charge is quite within the field of extra charge under the English statutes.

The Hall case, already cited (5 B. & M.'s Railway & Canal Traffic Cases, 28), shows that the charge would in England be considered a special charge for "the use of sidings" within the phrase "any other services incidental to the duty or business of the carrier," in Section 51 of the London, Brighton & South Coast Railway Company's Act of 1863. The charge would undoubtedly be justifiable also under that act as a "delivery" charge. In England railway companies now quite extensively make delivery of freight at the residence or business place of the consignee, substituting such delivery for the ordinary practice of delivering on their roads. Undoubtedly, a special charge could be made for this personal delivery, and it would be considered a delivery charge. Wherein does the delivery of live stock by appellees at the Union Stock Yards, off their own roads, differ substantially? The Union Stock Yards, where live stock shippers wish their cattle delivered because it is a great live stock market, is adopted by the shippers as their place of business.

The case of *Manchester, Sheffield & Lincolnshire Company* v. *Pidcock & Co.*, 10 Browne, Macnamara & Neville's Railway & Canal Traffic Company cases, 150, is thoroughly in point. The statutory schedule of charges allowed to the applicant company included (Sec. 5) a reasonable sum for services rendered "at or in connection with sidings not belonging to the company." Pidcock & Co. themselves owned a siding near the railway company's station yard, but having no direct connection with the main track and hence being accessible only by way of side tracks in the

railway company's station yard. It was held that the railway company could make a special charge, not only for service on Pidcock & Co.'s own side track, but also for the service of switching the cars over the side tracks in the station yard, because this latter service was requisite to the desired delivery in the special place of Pidcock & Co.'s own side track, and was accordingly a service "in connection with" Pidcock and Co.'s siding. How can this case be distinguished from the one at bar? The charge made by appellees is even more certainly sustainable, because it is for a service wholly off the appellees' own tracks.

A "shunting", *i. e.*, switching, service for the purpose of getting cars to a special place was upheld under an act permitting extra charges "for loading, covering and unloading and for delivery and collection, and any other service incidental to the duty or business of the carrier, * * * or for warehousing and wharfage, or for any other extraordinary services performed by the said company," in

Sowerby & Co. v. *Great Northern Railway Co.*,
7 B. & M. Railway & Canal Traffic Cases,
156.

Apart from any view of appellees' $2 charge as a siding charge, or a delivery charge, or a switching charge, it is for a service of highly special character, because it is done off appellees' premises, under a mere revocable car license, and for a charge which appellees have to pay for each car, and which is beyond control as to its reasonableness. Obviously, appellees could not be compelled to make delivery at the Stock Yards; for their charter obligations do not go beyond their own roads. If appellees consent, for the convenience of their patrons, to take live stock over the Stock Yards Company's tracks, it is a purely voluntary service, and one which appellees can any day discontinue This in itself is sufficient to make the service exceptional.

The English cases recognize this point likewise. It was said in the above cited case of *Manchester, Sheffield & Lincolnshire Railway Co.* v. *Pidcock & Co.* (10 B., M. & N.'s Railway and Canal Traffic Cases, 150):

> "The far end of the siding where Pidcock & Company load and unload is at some distance from its junction with the railway, and the railway company beside delivery at the junction, takes the trucks on to the further end of the siding. This, of course, is a voluntary service on their part, for no company is bound to travel beyond its own railway; and it may be doubted whether Section 5 applies, or should apply, to a service which a company could not be called to perform; for where an individual requires a service which it cannot have unless the company is willing to undertake it, it will be futile to fix any other sum to be paid for it than what the company thinks ought to be paid." (p. 160.)

While the charges made under such circumstances of voluntary service may well be subject to the requirement that they shall be reasonable in amount, there can hardly be a fair question that the entirely voluntary character of the service justifies separate charge of reasonable amount.

The same point as to voluntary service has again been adjudicated in England.

> *Watson, Todd & Co.* v. *Midland Railway Company*, 9 B. & M.'s Railway & Canal Traffic Cases, 90.

It is there said:

> "Now, in asking the railway company to arrange for the carriage off their own line, they were asking the railway company to do something that the railway company were under no obligation to perform." (p. 97.)

3. In view of the propriety of appellees' $2 charge, under the English statutes and decisions, as either a siding charge or a delivery charge or a switching charge or

a charge for an entirely voluntary service, it is unnecessary to argue specifically that this $2 charge may properly be classed as made for a "service connected with transportation," in the language of the Interstate Commerce Act.

It is also to be fairly considered, under modern railway and statutory usage, as a terminal charge within the language of that act. The present statutory definitions of terminal charge in England are of the most inclusive sort. and the words are obviously used in the Interstate Commerce Act, also, in a comprehensive manner.

In the *Regulation of Railways Act,* 1873 (36 *and* 37 *Vict., Ch.* 48), *Section* 15, it is declared that the railway commissioners

> "Shall have power to hear and determine any question or dispute which may arise with respect to the terminal charges of any company, where such charges have not been fixed by any act of parliament, and to decide what is a reasonble sum to be paid to any company for loading or unloading, covering, *delivery* and *other services of like nature.*"

The current definition of terminals in England, however, is as follows:

> "The term 'terminal charges' includes charges in respect of stations, *sidings*, wharfs, depots, warehouses, cranes and *other similar matters*, and of *any services rendered thereat.*"
>
> *Railway & Canal Traffic Act,* 1888 (51 *and* 52 *Vict., Ch.* 25), *Section* 55; *found in* 2 *Hodges on Railways, p.* 365.

Services on any siding are, therefore, terminal services. If a consignee has a side track of his own, say half a mile long, and wishes special delivery at the end of that side-track, the service of hauling on that track is peculiar to the special place of delivery and may fairly be considered a terminal charge. Within the English statutory definitions it is a terminal charge. It is no less so within the Interstate

Commerce Act. This case is just such, differing only in the fact that the consignee does not own the tracks to the Stock Yards. They are not tracks of the railway companies, however; and hauling over them is a service peculiar to the special delivery at the Stock Yards. They are, at least, within the words "and other similar matters," in the quoted English act of 1888; and it is not easy to suppose that "terminal charges" in the Interstate Commerce Act are narrower.

The Report of the Select Committee on Railways, 1882, contains the following language:

> "When the earlier railway acts were passed, it was supposed that the companies would be like the canal companies, who are owners of the route and their maximum tolls were fixed accordingly. But they subsequently became carriers and as carriers provided stations, sidings, warehouses, cranes and other fixed plants, which had in other cases been provided or leased by private firms. The evidence given before your committee proves conclusively that large sums have been expended by railway companies in providing from time to time for this accommodation. In the second place, they provided labor and appliances for loading, unloading, covering, collecting and delivery of traffic, which services vary with respect to different traffic. Some confusion has arisen from the use of the word 'terminal' for both these classes of service, and it would be well if distinct terms could be applied to them, such as 'station terminals' and 'handling terminals.' For these services they claim to be entitled by different acts of parliament to receive reasonable remuneration."

This report indicates that charges for the use of sidings for the purpose of reaching delivery place and for the work of deli vering, at any rate so far as the service is peculiar to any special place of delivery, are "terminal charges"; the former a so-called "station terminal," and the latter a so-called "handling terminal."

(See MacNamara's Law of Carriers, pages 226, 227.)

A discussion of the phrase "terminal charges" will be found in the opinion of the Interstate Commerce Commissioner Bragg, in the case of

Stone & Carten v. *Detroit, Grand Haven & Milwaukee Railway Company, 3 Interstate* Commerce Rep. (Lawyer's Co-operative Publishing Company's Edition), 60, 66.

See, also, concerning the propriety of a special charge in such circumstances as those of the present case,

National Tube Works Company v. *B. & O. Railway Company*, 8 Atl. Rep., 6 (Pa.).

Owen v. *St. L. & S. F. Ry. Co.*, 83 Mo., 454, 464.

4 *Elliott on Railroads, Section* 1566.

Detroit, G. H. & M. Ry. Co. v. *Interstate Commerce Com.*, 74 Fed. Rep., 803.

S. C., on appeal, as *Interstate Commerce Com.* v. *Ry. Co.*, 167 U. S., 633, 644-5.

4. All the advantages generally incident to a separate charge for a special service are found in the case of this $2 charge, viz., increased definiteness and consequent accuracy and intelligibility of charge, enhanced opportunity for reliable test as to reasonableness, avoidance of the charge by such as do not need the service for which it is laid, and consequent escape from a real discrimination between shippers needing the service and those not needing it. These advantages have been sufficiently commented upon in previous parts of this brief; but it should be noticed that there are two further special advantages from the separation of charge in the present case, viz:

(1) Stability in the charge. The number of shipping points in the west from which live stock goes to Chicago is enormous, and there is, therefore, an enormous number

of different rates to Chicago. These rates, unavoidably, over such a large area, with such complicated and shifting conditions of various kinds, are constantly fluctuating. If the charge for the terminal service were merely included as one element in an aggregate rate, it would, with the rest of the rate, be exposed to the influence of varying circumstances, such as affect the ordinary Chicago rates at large, and times would frequently come when it would be more difficult than with a separate charge for appellees to get fair compensation for the terminal work. Putting the charge in a form that attaches it distinctly to the special service for which it is laid tends to preserve it unchanged.

(2) A great portion, and perhaps most, of the live stock rates to Chicago are made from shipping points on the roads of companies other than appellees, and hence are joint rates which appellees have to divide with their connecting carriers. Appellees, however, do all the work for which the $2 charge is laid; and so long as it remains a distinct charge for this special work which appellees alone do, no question can be made about all of it going, as it ought, into the treasury of appellees. If, however, the character of the charge were obscured by its inclusion in a single aggregate rate, there would be constant pressure by connecting carriers for division of the entire rate, with the result of their sharing in the return for the terminal service which appellees alone perform.

5. Appellant's attorneys speak of the Stock Yards as "appellees' depot" for the delivery of live stock. This is one of the many cases where naming is unimportant, if the name does not lead to confusion and consequent disregard of realities. The actual facts are plain and undisputed in this record—that the appellees do not own, and have no control over, the Stock Yards, or the tracks of the Stock Yards Company leading to them; that such use

as appellees make of the Stock Yards Company's tracks and pens is merely under revocable license, for a price per car; that the service which appellees render in taking live stock to the Stock Yards is a voluntary service, beyond their charter obligations, which they may at any time discontinue; and that, by their tariffs, appellees treat delivery of live stock at the Union Stock Yards as different from an ordinary delivery on their own rails, declining to apply the ordinary Chicago rate to the former case, and imposing the special $2 charge for the peculiar service of getting to the Stock Yards and there delivering, at the cost to themselves not merely of their hauling expenses, but also of the trackage and unloading charges made by the Union Stock Yards as a condition for the use of its property by appellees. If the Union Stock Yards are called a depot of appellees, it can only mean that appellees voluntarily take stock there, when a shipper requests it, in the indicated manner and under the indicated circumstances and on the indicated terms. Calling the Stock Yards a depot in this sense does not alter the case; and calling them a depot in any other sense is impossible on the record.

6. Much is also said by appellant's attorneys to the effect that appellees have no facilities for unloading live stock on their own roads in Chicago; and on this basis they attempt to argue, or rather they insidiously suggest (for they do not argue it), that appellees must take live stock to the Union Stock Yards and deliver it there for nothing. If such a contention as this needs answers, there are several.

In the first place, the extent of special facilities for handling live stock that a carrier ought to supply depends upon the extent of the need for them. If the quantity of live stock to be delivered in a given place is small, so that it may be handled satisfactorily without special facilities,

there is no obligation upon the carrier to supply them. It is perfectly well known that occasional small lots of cattle can be handled without unusual facilities. Movable chutes and ordinary inclosures will suffice for such limited traffic. While it is shown in this record that most appellees have no extensive facilities on their own roads for handling live stock, it is neither shown nor pretended that they fail in successfully and properly handling such occasional lots of cattle as are delivered on their own roads, without going to the Stock Yards. The contrary is the fact. Indeed, the Atchison company has extensive facilities for handling live stock on its own road at Corwith. (Rec., 27.) The other appellees, without having such large special structures, have all the ordinary means of extensive railway plants, including, of course, more than ample inclosures for the little live stock which occasional shippers may not send to the Union Stock Yards; and they are not shown to have failed in a single instance to properly handle such a consignment.

But the plain and conclusive reply in this case to any argument founded on the claim that appellees have not sufficient facilities of a special character for unloading live stock on their own roads in Chicago, is that the lack of such facilities is wholly immaterial to the present issue.

This proceeding relates to the general question of what may properly be charged for transporting live stock from various shipping places to the Union Stock Yards. It stands admitted, therefore, for the purposes of the proceeding, that the live stock is consigned to the Union Stock Yards; for, otherwise, it does not have to pay the terminal charge which is the subject of the present litigation. If there be no adequate facilities for delivering live stock on appellees' own roads in Chicago, how does that fact injure shippers who direct their live stock to

be delivered at the Union Stock Yards? Such shippers would not make use of the arrangements for handling live stock on appellees' own roads even if such arrangements existed. Indeed, a delivery of live stock consigned to the Union Stock Yards anywhere else than at the Union Stock Yards—and even on appellees' own roads in Chicago—would be a misdelivery and a violation of the shippers' instructions. It is no reason why a shipper should not pay a proper price for use of terminal facilities that the carrier has no terminal facilities at another point to which the consignment is not made, and where it could not lawfully be delivered. The claim in the present case that live stock must be carried to the Union Stock Yards and delivered there without charge, because appellees have no extensive facilities for handling live stock on their own roads in Chicago, is no more rational than it would be to claim that a man who ships merchandise from Chicago to St. Paul over the North-Western road is entitled to have the service performed for him without charge, because the North-Western company has no station building somewhere on the prairie between Chicago and St. Paul. Only shippers wishing their stock delivered on appellees' own roads in Chicago, rather than at the Union Stock Yards, can raise the question whether appellees have adequate live stock facilities on their own roads; and the remedy of such shippers, if adequate live stock facilities do not exist on appellees' own roads, will be mandamus to compel provision of such facilities.

The Court of Appeals disposed of this matter very clearly in the Keenan case, as follows:

> "Upon the general and ordinary obligation of a common carrier of such freight to provide the appliances for unloading, and upon the fact that appellants have not provided means for unloading and delivering cattle at their freight depot in Chicago,

petitioners argue: First, that the $2 per car is for depot facilities at the stock yards; and, second, that the stock yards station must be held to be appellants' 'Chicago station,' in the same sense as would be the terminal station at 12th and State streets if cattle yards and facilities for unloading were there provided. *But the obligation of appellants to furnish delivery facilities upon their line of road in Chicago is not due to these petitioners with respect to cattle which appellants are expected to bring to the Union Stock Yards.*" (73 Fed. Rep., 760.)

Again:

"When, as here, the delivery is to be made in Chicago, but at a point away from the carrier's line, and by means of a track not owned or possessed by the carrier, the printed schedule of such carrier showing in two items the compensation exacted for the haul to Chicago, and that exacted for the transfer in Chicago to the point of delivery, the theory that such carrier is bound by law to unload such freight at a station on its own line in Chicago, and that the transfer from its line to a point on the other line for the purpose of delivering at the latter point (being an equivalent or substitute for what ought to have been done pursuant to such supposed obligation) is comprehended in the service of hauling to some station on its line in Chicago, is unsound. One side of the proposed equation is mythical. *There is no obligation on the carrier in such a case, and as to such a consignment, to unload at a station on its line in Chicago, or to provide unloading and delivery facilities at such station.*" (pp. 761, 762.)

7. Suppose that the Union Stock Yards Company itself hauled the live stock from the junction point of their tracks with appellees' roads, and charged appellees $2 per car as a total compensation for their trackage, their hauling and their unloading, and that appellees, for the purpose of reimbursing themselves, should then charge this $2 back to their shippers in the form of just such a separate charge as they now make. Who would question in that

case the propriety of appellees' $2 charge; and how does the present case differ in substance from the supposed transaction, as respects the propriety of appellees' $2 charge?

IV.

A PROCEEDING SUCH AS THIS, UNDER SECTION 16 OF THE INTERSTATE COMMERCE ACT, CALLS UPON THE FEDERAL COURTS TO EXERCISE THEIR INDEPENDENT JUDGMENT UPON THE FACTS AS WELL AS THE LAW OF THE CASE; AND THE CONCLUSIONS OF THE COMMISSION UPON QUESTIONS OF FACT MUST BE REJECTED BY THE COURTS IF SUCH CONCLUSIONS CONTRAVENE RULES OF LEGAL INFERENCE FROM ADMITTED OR ESTABLISHED FACTS, OR IF SUCH CONCLUSIONS APPEAR TO THE COURTS TO BE AGAINST THE PREPONDERANCE OF EVIDENCE. THE FACTS BY WHICH THE COMMISSION'S CONCLUSIONS OF FACT ARE TO BE TESTED MAY, OF COURSE, BE FURNISHED EITHER BY THE COMMISSION'S OWN FINDINGS OR BY EXTRANEOUS EVIDENCE INTRODUCED ON THE HEARING IN COURT.

1. The statutory provisions regulating such a proceeding as the present are as follows:

> "That whenever any common carrier, as defined in and subject to the provisions of this act, shall violate, or refuse or neglect to obey or perform any lawful order or requirement of the Commission created by this act, not founded upon a controversy requiring a trial by jury as provided by the Seventh Amendment to the Constitution of the United States, it shall be lawful for the Commission, or for any company or persons interested in such order or requirement, to apply in a summary way by petition to the Circuit Court of the United States, sitting in equity in the judicial district in which the common carrier complained of has its principal office, or in which the violation or disobedience of such order or

requirement shall happen, alleging such violation or disobedience, as the case may be.

And the said court shall have power to hear and determine the matter on such short notice to the common carrier complained of as the court shall deem reasonable, and such notice may be served on such carrier, or its officers or agents, or servants, in such manner as the court shall direct.

And said court shall proceed to hear and determine the matter speedily, as a court of equity, and without the formal pleading and proceeding applicable to ordinary suits in equity, but in such manner as to do justice in the premises; and to this end such court shall have power, if it think fit, to direct and prosecute in such mode and by such persons as it may appoint all such inquiries as the court may think needful to enable it to form a just judgment in the matter of such petition.

And on such hearing the findings of fact in the report of said Commission shall be *prima facie* evidence of the matters therein stated; and if it be made to appear to such court on such hearing, or on report of any such person or persons, that the lawful order or requirement of said Commission drawn in question has been violated or disobeyed, it shall be lawful for such court to issue a writ of injunction, or other proper process, mandatory or otherwise, to restrain such common carrier from further continuing such violation or disobedience of such order or requirement of said Commission, and enjoining obedience to the same."

Section 5 of Act of March 2, 1889, amending Section 16 of Interstate Commerce Law (1 *Sup. to U. S. Rev. Stats.*, 688).

The power and duty of the court to judge the evidence for itself follow plainly from this statute. It is enough to notice that the appeal is to the chancery side of the court; that it must appear to the court "that the *lawful* order of said commission drawn in question has been violated"; that the court is "to hear and determine the matter speedily, as a court of equity, * * * in such

manner as to do justice in the premises"; that power is given the court to prosecute "all such inquiries as the court may think needful to enable it to form a just judgment in the matter,"—and such inquiries of course would be upon matters of fact; and that the findings of fact by the Commission are merely *prima facie* evidence, *i. e.*, rebuttable.

The result is that the court is to try and determine the proceeding *de novo* as a chancellor, and must determine for itself from all the evidence whether the Commission's conclusions, even on questions of fact, were right.

2. This court has already held the statute to have the effect which we have stated, and the ground is covered by the following quotation:

> "The first contention we encounter, upon this branch of the case, is that the Circuit Court had no jurisdiction to review the judgment of the Commission upon this question of fact; that the court is only authorized to inquire whether or not the Commission has misconstrued the statute and thereby exceeded its power; that there is no general jurisdiction to take evidence upon the merits of the original controversy; and, especially, that questions under the third section are questions of fact and not of law, and hence unreviewable.
>
> We think this contention is sufficiently answered by simply referring to those portions of the act which provide that, when the court is invoked by the Commission to enforce its lawful orders or requirements, the court shall proceed, as a court of equity, to hear and determine the matter, and in such manner as to do justice in the premises.
>
> * * * * *
>
> Accordingly our conclusion is that it was competent, in the present case, for the Circuit Court, in dealing with the issues raised by the petition of the Commission and the answers thereto, and for the Circuit Court of Appeals on the appeal, to determine the case upon a consideration of the allegations of the

parties and of the evidence adduced in their support, giving effect, however, to the findings of fact in the report of the Commission as *prima facie* evidence of the matters therein stated.

It has been uniformly held by the several Circuit Courts and the Circuit Courts of Appeal, in such cases, that they are not restricted to the evidence adduced before the Commission, nor to a consideration merely of the power of the Commission to make the particular order under question, but that additional evidence may be put in by either party, and that the duty of the court is to decide, as a court of equity, upon the entire body of evidence.

Coming at last to the questions of fact in this case, we encounter a large amount of conflicting evidence. It seems undeniable, as the effect of the evidence on both sides, that an actual dissimilarity of circumstances and conditions exist between the cities concerned, both as respects the volume of their respective trade and the competition, affecting rates, occasioned by rival routes by land and water. Indeed, the Commission itself recognized such a state of facts by making an allowance, in the rates prescribed, for dissimilarity resulting from competition, and it was contended on behalf of the Commission, both in the courts below and in this court, that the competition did not justify the discriminations against Troy to the extent shown, and that the allowance made therefor by the Commission was a due allowance.

The issue is thus restricted to the question of the preponderance of the evidence on the respective sides of the controversy. We have read the evidence disclosed by the record, and have endeavored to weigh it with the aid of able and elaborate discussions by the respective counsel.

No useful purpose would be served by an attempt to formally state and analyze the evidence, but the result is that we are not convinced that the courts below erred in their estimate of the evidence, and that we perceive no error in the principles of law on which they proceed in the application of the evidence."

Interstate Commerce Commission v. *Alabama Midland R'y. Co.*, 168 U. S., 174–176.

The decisions of all the courts—the Circuit, the Court of Appeals and this court—were, in the case just cited, against the Commission on the facts.

In the case of *Texas & Pacific Ry. Co.* v. *Interstate Commerce Commission*, 162 U. S., 197, this court decided that the Court of Appeals ought not to consider the facts, and itself render decree thereon, when the Commission itself has failed (through a mistaken view of the law) to investigate the facts. In other words, the appellate courts are not to assume the initiative as to the facts, though they will and must revise the Commission's conclusions of fact when once the Commission has made them. The decision of the Court of Appeals was reversed by this court, because the former undertook to justify the Commission's orders by finding facts which the Commission had not investigated. The distinction between the impropriety of the Court of Appeals' considering, originally, new questions of fact not considered by the Commission, and its reviewing, on the other hand, the questions of fact which were actually investigated by the Commission, is clearly set forth in the recent case of

Louisville & Nashville Ry. Co. v. *Behlmer*, 175 U. S., 648.

Mr. JUSTICE WHITE there said:

> "If, then, we were to undertake the duty of weighing the evidence in this record, we would be called upon, as a matter of original action, to investigate all these serious considerations which were shut out from view by the Commission and were not weighed by the Circuit Court of Appeals, because both the Commission and the court erroneously construed the statute. But the law attributes *prima facie* effect to the findings of fact made by the Commission, and that body, from the nature of its organization and the duties imposed upon it by the statute, is peculiarly competent to pass upon questions of fact of the character here arising. In *Texas &*

Pacific Railway v. *Interstate Commerce Commission* (*ubi supra*) the court found the fact to be that the Commission had failed to consider and give weight to the proof in the record, affecting the question before it, on a mistaken view taken by it of the law, and that on review of the action of the Commission the Circuit Court of Appeals, whilst considering that the legal conclusion of the Commission was wrong, nevertheless proceeded as a matter of original investigation to weigh the testimony and determine the facts flowing from it. The court said (p. 238):

'If the Circuit Court of Appeals was of opinion that the Commission in making its order had misconceived the extent of its power, and if the Circuit Court had erred in affirming the validity of an order made under such misconception, the duty of the Circuit Court of Appeals was to reverse the decree, set aside the order, and remand the cause to the Commission, in order that it might, if it saw fit, proceed therein according to law. The defendant was entitled to have its defense considered, in the first instance, at least, by the Commission upon a full consideration of all the circumstances and conditions upon which a legitimate order could be founded. The question whether certain charges were reasonable or otherwise, whether certain discriminations were due or undue, were questions of fact, to be passed upon by the Commission in the light of all facts duly alleged and supported by competent evidence, and it did not comport with the true scheme of the statute that the Circuit Court of Appeals should undertake, of its own motion, to find and pass upon such questions of fact, in a case in the position in which the present one was.'" (pp. 675–676.)

Mr. JUSTICE SHIRAS added, in 162 U. S., 197, immediately after the preceding quotation from him by Mr. JUSTICE WHITE, the following paragraph:

"We do not, of course, mean to imply that the Commission may not directly institute proceedings in a Circuit Court of the United States charging a common carrier with disregard of the provisions of the act, and that thus it may become the duty of the

court to try the case in the first instance. Nor can it be denied that, even when a petition is filed by the Commission for the purpose of enforcing an order of its own, the court is authorized to 'hear and determine the matter as a court of equity,' which necessarily implies that the court is not concluded by the findings or conclusions of the Commission; yet as the act provides that, on such hearing, the findings of fact in the report of said Commission shall be *prima facie* evidence of the matters therein stated, we think it plain that if, in such a case, the Commission has failed in its proceedings to give notice to the alleged offender, or has unduly restricted its inquiries upon a mistaken view of the law, the court ought not to accept the findings of the Commission as a legal basis for its own action, but should either inquire into the facts on its own account, or send the case back to the Commission to be lawfully proceeded in." (pp. 238–239.)

In the case of *Texas & Pacific Ry. Co.* v. *Interstate Commerce Commission*, 162 U. S., 184, the Commission had ordered two different things: (1) that rates from Cincinnati to Social Circle should not exceed the longer-distance rates from Cincinnati to Augusta; and (2) that rates from Cincinnati to Atlanta should not be more than $1 per hundred weight. While the first part of the order was upheld, the second part (concerning Atlanta rates) was overturned by the courts for the following reason, as stated by Mr. JUSTICE SHIRAS:

"Without stating the reasoning of the Circuit Court, which will be found in the report of the case in 64 Fed. Rep., 981, the conclusion reached was that the evidence offered in that court was sufficient to overcome any *prima facie* case that may have been made by the findings of the Commission, and that the rate complained of was not unreasonable.

As already stated, the Circuit Court of Appeals adopted the views of the Circuit Court in respect to the reasonableness of the rate charged on first-class freight carried on defendant's line from Cincinnati to Atlanta, and as both courts found the existing

rates to have been reasonable, we do not feel disposed to review their finding on that matter of fact." (pp. 195–196.)

3. The facts found by the Commission itself cannot have less evidential value to rebut the Commission's conclusions than the same facts would have if the Commission had not found them and they had been established by evidence in court; and we shall later contend that the Commission's conclusions in this case are rebutted by facts which they themselves find.

4. Thus far our argument has been merely that the court is called upon to weigh the evidence for and against the Commission's conclusions. Even if that were not true, it would be manifest that the court must reject such conclusions of fact by the Commission as are wholly unreasonable upon the evidence. Even a verdict of a jury must be set aside by the court, if it be such as a reasonable man could not render upon the evidence. The error in the verdict becomes in such case error in law, and not merely error of fact, and appellate law courts, which by their constitution have to do only with errors of law may and must set aside verdicts on such grounds. No less is true of the power of courts over the conclusions of the Interstate Commerce Commission.

As shown in the Statement of Facts, the Commission found that the cost of the terminal service in Chicago is not less than $2, the amount of the terminal charge; and we shall contend that the law forbids the idea that a charge is unreasonble in amount which does not exceed the cost of the service for which it is rendered. A verdict by a jury that such a charge is unreasonable would be set aside by any court.

V.

ONLY THE $2 CHARGE—NOT THE GENERAL CHICAGO RATE—WAS THE SUBJECT OF COMPLAINT BEFORE THE COMMISSION, OR WAS INVESTIGATED BY THE COMMISSION, OR IS THE BASIS OF THE COMMISSION'S ORDERS HERE SOUGHT TO BE ENFORCED. NO QUESTION CONCERNING THE GENERAL CHICAGO RATE IS INVOLVED IN THIS PROCEEDING; AND IF THE TERMINAL CHARGE IS IN ITSELF LAWFUL, THE CIRCUIT COURT WAS RIGHT IN DISMISSING THIS PROCEEDING, AND ITS ACTION MUST BE AFFIRMED BY THIS COURT, WITHOUT ANY CONSIDERATION OF THE PROPRIETY OF THE GENERAL CHICAGO RATE.

1. The petition herein assails only the terminal charge. It declares that the original petition to the Commission alleged "that defendants imposed an unjust and unreasonable terminal charge at Chicago, Ill., of $2 per carload of live stock, and in imposing such terminal charge defendants unjustly discriminated against the said City of Chicago, Ill." (Rec., 2.) It declares that the Commission found "that said terminal charge at Chicago, Ill., of $2 per car of live stock was unjust, unreasonable and unlawful." (Rec., 3.) It alleges the making of the Commission's orders in reference solely to the terminal charge (Rec., 3); and avers that appellees disobeyed those orders by not reducing the terminal charge. (Rec., 5.) Finally, the prayer of the petition is that defendants be judicially directed to comply with the orders of the Commission relating solely to the terminal charge. (Rec., 5.)

2. The Commission recognized in its opinion that the question before it related solely to the terminal charge, saying:

"This brings us to the real question, and it is im-

portant to observe exactly what that question is. *It is not as to the reasonableness of the through rate as a whole, including this terminal charge, but merely as to the lawfulness of the terminal charge itself.*

Ordinarily the whole rate is the only thing which is or can be considered and passed upon. The Commission has nothing to do with the division of that rate, that being a matter which is left entirely to the agreement of the carriers themselves. *Here, however, the rate as a whole is not called in question, and there is no evidence in the case from which it can be found that the through rate from the points in question to Chicago is or is not a reasonable rate.* It must be assumed that the rate, excluding this terminal charge, is a fair one to both parties.

If the through rate were what was really aimed at by the complaint, then all ground of complaint has been removed since the complaint itself was filed. About October 1, 1896, rates on live stock from points embraced in the territory covered by this complaint to all western markets, including Chicago, were reduced 5 cents per hundred pounds. This would amount to from $10 to $15 per car. Therefore, the Texas shipper could actually deliver his stock in Chicago for from $8 to $13 per carload cheaper than he could before the $2 rate was imposed, and all the complaint asks for is the abolishment of that terminal charge.

This charge is imposed by the terminal carriers at Chicago, and those carriers receive and retain the entire amount of that charge. The complaint is that this charge is an unlawful one, that *no matter what the Chicago rate may be* the addition of this particular sum to that rate is in violation of the Act to Regulate Commerce." (Rec., 34.)

Confessedly, also, the through rates to Chicago from a very large portion of the great region where live stock is raised and whence it is shipped to Chicago, have been largely reduced since June 1, 1894, when the terminal charge was established. The quotation just made from the Commission states that fact. The reduction is found to have been 5 cents per hundred pounds, which is more than five times the amount of the terminal charge, inasmuch

as an average carload of stock certainly exceeds twenty thousand pounds. If the ordinary Chicago rate were the subject of complaint these reductions since June 1, 1894, would more than have met the complaint.

3. The orders made by the Commission, and here sought to be enforced, deal only with the terminal charge. They forbid that charge absolutely, and without any reference to the the amount of the ordinary Chicago rate at any time.

4. The Commission dismissed from the proceeding and made no order against the carriers, originally made defendants before the Commission, who are parties with appellees to the rates to Chicago from far the largest part of the live stock shipping area. This action of the Commission was because such carriers, other than appellees, did not participate in the terminal charge, which is received solely by appellees, who alone do the terminal work. If, however, the complaint were about the ordinary or flat Chicago rates, and if such rates were found too high, the order of the Commission and of the courts would have to be against all the carriers participating in the Chicago rates, and not merely against appellees.

5. It is further to be remembered that the rates to Chicago from live stock shipping points in the tremendous territory to the north-west, west and south-west of Chicago are thousands in number. Those rates have been fixed at different times by different agencies, under different circumstances, and in response to different competitive influences and conditions. Determination of the reasonableness or unreasonableness of one of those rates would do nothing toward determining the reasonableness or unreasonableness of another of those rates. Some of them may be unreasonable, even if most of them are

reasonable. No such task as adjudication upon the propriety of all those rates was presented to the Commission or is now before the court.

VI.

THE $2 TERMINAL CHARGE IS SHOWN BY THE COMMISSION'S OWN FINDINGS TO BE LESS THAN THE ACTUAL COST OF THE TERMINAL SERVICE FOR WHICH IT IS CHARGED, AND IS THEREFORE CONCLUSIVELY PROVED TO BE REASONABLE.

While this point is the focus of the entire case, it will need no extensive argument, in view of the Commission's explicit findings. We shall refer to these findings as set forth in the Statement of Facts at the beginning of this brief; shall also call attention to other important evidential facts found by the Commission and supporting the reasonableness of the charge; shall urge, and refer to this court's decisions, that a railroad charge which does not exceed the cost of service cannot be unreasonably high; and shall finally comment briefly upon the argument of the Commission on this head.

1. In the Statement of Facts we have already called attention to the Commission's findings concerning the cost of the terminal service, as follows:

(1) Detailed showing of such items of cost as can be directly calculated. (Statement of Facts, pages 9, 10; Rec., 25, 26.)

(2) Intervener, the Chicago Live Stock Exchange, frankly stated that the amount of the terminal charge is reasonable. (Statement of Facts, page 9; Rec. 41.)

(3) The Commission conceded, in the midst of the hearing before it, that the cost of the terminal service

equals the charge for it, and dispensed with the introduction by appellees of any further testimony on that point. (Statement of Facts, page 12; Rec., 48.)

(4) The Commission explicitly found, on the application for rehearing, that the terminal charge is reasonable unless circumstances forbid imposing a terminal charge. We repeat that finding here:

> "To remove all doubt upon that subject, however, if it is not clearly found, we now find that, looking entirely to the cost of service, and including as a part of that cost the trackage charge paid the Union Stock Yards and Transit Company and the unloading charge paid that same company, *the amount of this terminal, if, under the circumstances of this case, it is proper to impose the charge, is reasonable.* If any modification of the present findings is necessary, they are hereby modified to that extent." (Statement of Facts, page 12; Rec., 49.)

2. There are two evidential facts, not mentioned in the Statement of Facts, but found by the Commission, which are almost as forcible as the direct finding of the Commission, to show that the terminal charge is reasonable.

> (1) "If the charge for this terminal service is to be regulated by what is ordinarily charged for switching, the present charge is a reasonable one. The testimony showed that it seldom happened that a lower switching charge than $2 was made, and that this amount was often exceeded." (Rec., 27.)

It will be remembered that the distance over which cars of live stock have to be hauled by appellees, on other than their own tracks, varies from two to nine miles. (Rec., 27.)

(2) The Commission also found what it costs to haul a carload of dead freight to the Union Stock Yards over the same routes traversed by cars of live stock; and this finding ought in itself to be practically conclusive as to the

reasonableness of the terminal charge on live stock, for it cannot be pretended that it costs less to haul a car of live stock than to haul a car of dead freight. The Commission's finding on this point is as follows:

> "The building of the packing houses in 1878 furnished large quantities of dead freight both in and out over the tracks of the Stock Yards Company, and for moving the cars containing this freight that company imposed from the first a wheelage charge of 40 cents per car each way. From 1878 down to June, 1893, the railroad did the work of moving these cars in and out over the tracks of the Stock Yards Company. At first each carrier moved its own cars, but soon an arrangement was made by which certain engines and a certain gang were employed in this work, the different carriers paying the actual expense in proportion to the number of cars moved. In 1893 it seemed best on all accounts that the Stock Yards and Transit Company should undertake to move these cars in and out over its tracks, and an arrangement was made by which the various railroad compaines were to pay the Stock Yards and Transit Company for this service upon the basis of what it had actually cost the railroads themselves. This was found to be about 80 cents a car each way, which, added to the trackage charge of 40 cents a car each way, makes $2.40 per car in all, and at the present time the defendants pay the Union Stock Yards and Transit Company $2.40 for every car of dead freight which is handled in and out of the stock yards. This applies to all the defendants, except the Northwestern and the Chicago, Burlington and Quincy, which pay $3.10 per car, the distance being greater in the case of those companies." (Rec., 24.)

It thus appears that the cost of hauling a car of dead freight over the same tracks as are used for live stock cars amounts to $1.60 per car (exclusively of any trackage charge); and addition of the trackage charge, varying from 80 cents to $1.50, makes the total cost from $2.40 to $3.10 per car. As we said before, there can be no pretense that the live stock service costs less; on the con-

trary, it costs more because there is an additional unloading charge of 25 cents per car.

3. The law itself forbids any idea that a charge which does not exceed the actual cost of the service for which it is laid is unreasonably large. Indeed, the law allows a reasonable profit above the cost. Whether a charge is reasonable which does not exceed the cost is not a question of fact, but of law; and only an affirmative answer is permissible under the law.

This need not be amplified. It is the fundamental principle of all the so-called "rate cases," in which schedules of railroad rates established by railroad commissions, or even by legislatures, have been held unconstitutinal, because not compensatory.

Smythe v. *Ames*, 169 U. S., 466.

Reagan v. *Farmers' Loan & Trust Co.*, 154 U. S., 362.

C. M. & St. P. Ry. Co. v. *Minnesota*, 134 U. S., 418.

If a railroad company can be compelled to perform one service for a charge less than the cost of that service, it can be equally compelled to do other service for less than cost; and so its entire business can be required to be done at a loss.

4. The argument by which appellant seeks to accomplish the result of requiring the terminal service to be done for less than cost (if not, indeed, gratis) is that appellees did the service of carrying live stock to Chicago from various shipping points, and of delivering live stock at the Union Stock Yards, before June 1, 1894, for the ordinary Chicago rate without any terminal charge; that the ordinary rate was presumably reasonable compensation for the entire service, including carriage to the Union

Stock Yards, and that, consequently, the addition of the $2 terminal charge on June 1, 1894, makes appeelles' compensation too great. Before stating the conclusive reply to this reasoning (as respects the reasonableness of the terminal charge) it should be said that the argument rests upon premises which are purely technical and altogether false. The argument assumes that the rates before June 1, 1894, were exactly right, though there is no evidence whatever on that point; and it further assumes that the ordinary Chicago rates have not been reduced since June 1, 1894, whereas, in fact, they have been reduced very much more than enough to offset the terminal charge over a large part of the live stock shipping area. (Rec., 34.)

The question whether the Chicago rates, from all the various stock shipping points, were as high on May 31, 1894, as could properly be charged for the transportation of live stock from those various shipping points to the Union Stock Yards at Chicago, was not investigated by the Commission. As already shown, it was not made an issue by the pleadings before the Commission, and no evidence whatever on that question is in the record. The Commission itself states that "there is no evidence in the case from which it can be found that the through rate from the points in question to Chicago is or is not a reasonable rate." (Rec., 34.) It would be an appalling task to undertake an investigation of the reasonableness, on May 31, 1894, of all the rates on live stock between the live stock producing territory and Chicago; and, as already stated in this brief, all these various rates would have to be considered separately on their own several merits. The statement of the Commission that the rates existing May 31, 1894, may be assumed to be reasonable is a pure technicality. If such rates had been attacked, they would have been assumed not to be too high, under

the general presumption of innocence extended to any defendant in a court of justice; but they would not have been presumed, even when thus directly attacked, to have been all that could have been properly charged. The presumption would be merely that they were not more than could properly be charged. Such presumption is not of evidential value in a case like the present. If a rate is to be taken as right because it is in existence at a given time, there is as much reason for supposing the rates right as they have stood since June 1, 1894, as there is for supposing them right before that time. How foolish it is for a tribunal that is seeking to arrive at the truth and do justice to condemn the terminal charge of $2, which is demonstrated to be less than the value of the terminal service for which it is laid, on the mere claim that the Chicago rates prior to June 1, 1894, must be supposed (without any evidence whatever) to have been exactly right—and that, too, from every shipping point in the great area traversed by appellees' lines of railroad, and shipping live stock to Chicago, viz., Illinois, Wisconsin, Minnesota, Iowa, Missouri, Texas, Kansas, Oklahoma, Nebraska, Wyoming, North Dakota, South Dakota, Montana, and the great regions still further west. Let the court consider these three things:

(1) The almost insuperable difficulty of determining in any case just the right amount of charge for a particular railroad transportation.

(2) The fact that railroad charges are in most cases profoundly influenced, if not wholly determined, by competitive and other general conditions.

(3) The fact that Chicago live stock rates were fluctuating before June 1, 1894, all the time up and down, as railroad rates inevitably go everywhere, in response to varying conditions; and that there is no more reason for

supposing the existing rates to be right at one period of the fluctuation than at another period—and then, with these considerations in mind, let the court estimate at its true worth an argument that rests on the premises (unsupported by evidence) that the thousands of different rates on live stock to Chicago from all the great live stock raising territory happened to be of just the right amount on May 31, 1894—so exactly right, indeed, that an addition of a fraction of a cent per hundred weight would make the rate unreasonably high! Such is the foundation of the argument upon which appellant asks this court to reverse the Circuit Court and compel appellees to do for $1 (or possibly for nothing) a terminal service that indisputably costs more than $2.

The second assumption in appellant's argument is also wrong in fact. It supposes that the Chicago rates have remained the same since June 1, 1894. On the contrary, they have been largely reduced since then over extensive portions of the live stock raising region. (Rec., 34.) These reductions, it is true, were not made for the purpose of offsetting the terminal charge; but they have that effect none the less, and would destroy the argument of appellant under discussion.

5. The final reply, however, to appellant's contention that the total charge for carrying from the place of shipment to the Union Stock Yards is now more than it was on the day before June 1, 1894—for the Commission actually considers the situation with reference to May 31, 1894 (Rec., 49)—should be independently stated, because of its absolute conclusiveness, and is as follows:

Appellant's argument, if it can be supposed to indicate anything, tends merely to show that the flat Chicago rate is too high, and has not the least tendency to show that the $2 terminal charge is too high.

Let us take, for example, a shipment of live stock from Kansas City to Chicago Union Stock Yards. We will suppose that the rate from Kansas City to Chicago, on May 31, 1894, was $100. The Commission says that such rate was charged that day (May 31, 1894) for carrying from Kansas City clear to the Union Stock Yards; and now, says the Commission, the shipper has to pay $102 (the regular rate plus the terminal charge) for the same service. Assuming then that the $100 charge was right, the Commission says that $102 is too much, and that the terminal charge is consequently unreasonable. We have already seen (in point 4 just preceding) that the premises of this argument are wrong. It cannot be known (for there is no evidence on that most complicated question) whether the Chicago rates on May 31, 1894, were exactly right; and beyond that, the Chicago rates have been extensively reduced since June 1, 1894. But passing these difficulties, and admitting the premises for present purposes, does it follow that the $2 terminal charge is wrong? Not at all. The argument leads merely to the view that $102 is too much to charge from Kansas City to the Union Stock Yards; but it does not show that the excess is in the $2 terminal charge. On the contrary, it follows mathematically that the excess (assuming it to be somewhere in the $102) is in the flat Chicago rate, as it has been since June 1, 1894, and not in the $2 terminal charge. This follows from two considerations:

(1) Of the total charge of $102, which is supposed to be wrong, the terminal charge factor ($2) is shown, by direct evidence, to be right, because the terminal service is shown to cost $2. The whole $102 being supposed to be wrong, and one factor, the $2 terminal charge, being known to be right, the error (if anywhere) must be in the other factor, viz., the flat Chicago rate.

(2) The same thing appears in another way. Before June 1, 1894, the $100 flat rate to Chicago is supposed by appellant's argument to have paid for carrying the live stock all the way to the Union Stock Yards. Now, however (on appellant's erroneous assumption that the Chicago rate has not since been reduced), the same charge of $100 is made, under appellees' existing tariffs, for the shorter service of carrying merely to the junction point of appellees' own roads with the tracks of other companies leading to the Stock Yards. If $100 was right for the larger service on May 31, 1894, $100 must now be wrong for the smaller service for which it has been charged since June 1, 1894.

It is thus demonstrable that appellant's argument, if all its premises are admitted, leads only to the conclusion that the flat Chicago rate is wrong, and in no way assails the reasonableness of the $2 terminal charge.

The Commission itself at one time saw the force of the point. We quote from their second opinion:

> "The defendants contend that the terminal charge is a reasonable one, and that if any part of the rate is wrong it is the charge for transportation from the point of origin to the point in Chicago where the cars leave the tracks. *Abstractly this may be true,* but in dealing with these transportation problems the purpose is to reach practical justice. The Chicago rate is so much per hundred pounds, and would vary with the number of pounds contained in each car. This terminal charge is a definite amount per car. It would, therefore, be impossible to exactly offset the terminal charge by any corresponding reduction in the rate per hundred pounds. The terminal carrier at Chicago, as the case shows, receives and retains the entire amount of this terminal charge. Assuming, therefore, that this company was already compensated for this service, it now receives and retains just $1 too much per car. The only method by which absolute justice can be done is to compel the carrier to desist from exacting

this sum. Surely the fact that the railroad company is already receiving pay for this service is good ground for holding that a second charge is unreasonable." (Rec., 52, 53.)

It will be seen that the Commission recurs all the time to its notion that there is a case of double charge for the same service—which this court has declared on the tariffs in force since June 1, 1894, is not the case. Under their tariffs appellees are not paid one penny for the terminal service of getting stock to the Union Stock Yards, except as they may be paid through the collection of the terminal charge.

It will not do to admit, as the Commission itself admits, that the faulty charge (if anywhere) is in the flat Chicago rate, and not in the terminal charge, and then to attempt what the Commission calls "practical justice" by leaving the flat Chicago rate (which is asserted to be wrong) unchanged, and making an offsetting change in the terminal charge (which the Commission admits to be right). This will not do, for the following reasons:

(1) We have seen (point V) that the flat or general Chicago rate is not assailed iu this proceeding. The issue and the evidence before the court concern only the propriety of the terminal charge.

(2) Whatever the Commission may attempt in the way of "practical" but not "abstract" justice, this court is not in the habit of righting one wrong by doing another.

(3) As a matter, too, of "practical justice," it will not do to take off from the terminal charge, though its amount is reasonable, a sum sufficient to balance the alleged unreasonableness of the flat Chicago rate. As stated by the Commission, appellees alone receive the terminal charge and do the work by which the terminal charge is earned. The flat Chicago rates, however, over

a very large part of the live stock shipping region, are joint rates made and shared by appellees with numerous other carriers who were originally defendants in this proceeding, but whom the Commission dismissed from the proceeding because they did not participate in the terminal charge. This dismissal of the other carriers than appellees from the case was entirely erroneous, if the flat or general Chicago rates are too high; and the attempt to correct the flat Chicago rates by reducing the terminal charge makes appellees bear the burden of the entire reduction, while a reduction of the flat Chicago rates would fall, and (if those rates are wrong) ought to fall, not on appellees alone, but proportionately upon the other carriers participating in those rates, whom the Commission dismissed from the proceedings.

(4) The Commission's order is also improperly framed, if the terminal charge itself be reasonable, and there be unreasonableness only in the Chicago rates. In such case the order ought not, at any rate, to condemn the terminal charge, except so long as the Chicago rates remain as high as they were May 31, 1894. The Commission's order as actually made, however, forbids collection of the terminal charge, however much the general Chicago rates may be reduced.

The result of the Commission's arguments is therefore (like the requirement of the facts found by the Commission) to place the reasonableness of the terminal charge beyond question.

VII.

NO CLAIM CAN BE MADE THAT THE TERMINAL CHARGE CONSTITUTES AN UNDUE PREJUDICE AGAINST CHICAGO, BECAUSE THE COMMISSION HAS ITSELF FOUND THAT IT IS NOT, UNLESS IT IS UNREASONABLE, (AND THEREFORE THE CASE REDUCES TO A QUESTION WHETHER THE AMOUNT OF THE TERMINAL CHARGE IS TOO GREAT FOR THE SERVICE FOR WHICH IT IS CHARGED); AND BECAUSE THE COMMISSION'S ORDERS, HERE SOUGHT TO BE ENFORCED, CONDEMN THE TERMINAL CHARGE ABSOLUTELY AS UNREASONABLE, NOT AS A DISCRIMINATION.

Very little need be said on this point. The Commission itself has disposed of the matter, and on the hearing in the Circuit Court and in the Court of Appeals its counsel did not contend that the terminal charge is unlawful unless it is a second charge levied for a service for which the ordinary Chicago rate itself pays, or unless it is inherently unreasonable. Nor in the brief for the Commission in the Court of Appeals or in this court is the terminal charge argued to be an undue prejudice to Chicago, unless it is faulty in itself for one or the other of the same two reasons. We shall therefore merely indicate that the question of discrimination is not before the court, and refer finally to the evidence in the Commission's findings showing that the terminal charge works no undue prejudice in fact.

1. The express finding of the Commission that the terminal charge is not discriminatory unless unreasonable is given in full in our Statement of Facts (pp. **12, 13,** *ante;* Rec., 38; 54, 55.)

We refer to our previous quotation of this finding, instead of repeating it here.

2. The Commission's order forbids the terminal charge absolutely, and therefore is not such an order as it ought to be if based upon a finding of discrimination. If the trouble with the terminal charge were that it is wrong, not *per se*, but only in relation to appellees' charges elsewhere, then the order ought to give appellees the option to make the relation right by altering such other charges while retaining the terminal charge. The order should, in that case, prohibit the terminal charge unless appellees should now or hereafter (1) lower the general Chicago rate, or (2) raise the rates to other live stock markets, or (3) impose a like terminal charge at such other markets. Any one of these three courses would cure the supposed discrimination. The order as made, however, and as the court is asked to enforce it, prohibits the terminal charge absolutely under any circumstances, and however the relation of rates between Chicago and other live stock markets may at any time be altered.

We called attention to this feature of the Commission's order in our argument on point I (*ante*, pp. 27, 28).

In the case of *Detroit, G. H. & M. Ry. Co.* v. *Interstate Commerce Commission*, 74 Fed. Rep., 803, the Commission made an order which, though founded upon discrimination between two different localities, absolutely prohibited the discriminating charge, and the Circuit Court of Appeals held the order erroneous, because not allowing the carrier any liberty to remove the discrimination in any other way. The court said:

> "From what has been already ruled, it is apparent that even if the Commission had established by its inquiry an abuse to be remedied, the order it gave was not a proper one, and should not be enforced. Large as its powers may be, and plenary as may be the authority of the court to enforce, by mandatory injunctions or otherwise, obedience to its orders, its powers are those of regulation, and not construction or re-

construction. *Interstate Commerce Commission* v. *Baltimore & O. Ry. Co.*, 43 Fed. Rep., 37, 50, and 145 U. S., 263. And now see *Cincinnati, N. O. & T. P. Ry. Co.* v. *Interstate Commerce Commission* (Oct., 1895), 16 Sup. Ct., 700. This is, as the Commission has made it, a dispute about discriminating rates, and the easy remedy on such a complaint is readjustment of the rates to cover the discrepancy. As was said in one of the cases we have cited, the method of redress by readjusting rates must always be left open to the choice of the company, at least in the first instance; and in the St. Louis case, *supra*, the Commission adopted that course, and made the proper order. *Here was an arbitrary and peremptory order to abandon the accessorial cartage at Grand Rapids, without regard to any rates, or without option as to readjustment of them, the defendant company not even being allowed the alternative of establishing a like service at Ionia.* It is, in its nature, not a regulation of commerce, so much as an interference with the rights of property and its use, which possibly even Congress could not, in this way, prohibit. At all events, it is an attempted exercise of a legislative power which Congress has not, we think, conferred upon the Commission." (pp. 840–841.)

And, concerning a claim that a certain rate had been found inherently unreasonable, this court said:

"As the Circuit Court only affirmed the order of the Commission, which directed the carriers to desist from charging a greater compensation for the shorter haul to Chattanooga than for the longer haul to Nashville, there is no room for the conclusion that it found affirmatively that independently of the charge to Nashville the rate to Chattanooga was *per se* unreasonable. For, of course, a decree which ordered the carriers to desist from charging a greater compensation for the lesser than for the longer haul, would be in no way responsive to the conclusion that the rate for the lesser distance was unreasonable in and of itself."

East Tennessee, etc., Ry. Co. v. *Interstate Commerce Commission*, 181 U. S., 1, 23.

In the same case it was again said:

> "The decree which was entered, however, did not declare the rates charged to Chattanooga to be unreasonable, but simply affirmed the order of the Commission directing that no greater sum be charged for the carriage of freight to Chattanooga, the shorter, than was exacted to Nashville, the longer, distance. As we have already shown, such a decree is not responsive to the conclusion that the rates to Chattanooga were in and of themselves unreasonable, since the right to continue to exact them was sanctioned, provided the traffic to Nashville was either abandoned or the rate to Chattanooga made the same as to Nashville." (p. 26.)

In like manner in this case, the order of the Commission is *not responsive* to any claim of undue prejudice to Chicago, through alleged wrong relation of its rates to the rates enjoyed by other live stock markets.

3. The facts found at length by the Commission, and on which the Commission was led to the conclusion that the terminal charge constitutes no discrimination, if otherwise justifiable, amply bear out that view; and would induce the court to negative any claim of unjust discrimination, even if the Commission had not already done it. (Rec., 36–38.)

It may be repeated here that appellant's argument, founded on the claim that the total cost of transporting live stock from the various shipping points to the Union Stock Yards at Chicago has been increased since May 31, 1894, is no more valid upon the question of discrimination than it is upon the point of reasonableness. That argument has already been fully considered and shown to rest upon the two false premises that all the general rates to Chicago were exactly right on May 31, 1894, and that no reduction of those rates has been made since June 1, 1894. We may add, in the present connection, that it rests upon

a further premise (which likewise is assumed without any evidence whatever) that all the rates from all shipping points to the other live stock markets than Chicago were exactly right on May 31, 1894, viz., the rates from all shipping points to Sioux City, Omaha, St. Louis, St. Joe and Kansas City. We likewise showed that the argument of appellant (even if all these premises are admitted for the sake of argument) leads only to the conclusion that the ordinary Chicago rate—not the terminal charge—has been increased from what it was on May 31, 1894. We will not repeat our argument on that point; but it is just as pertinent here as it was concerning the reasonableness of the terminal charge. (See pp. 83–90, *ante*.)

VIII.

THE INTERSTATE COMMERCE COMMISSION IS NOT EMPOWERED TO ADMINISTER THE ANTI-TRUST ACT, AND THEREFORE COURTS CANNOT ADMINISTER THAT ACT, IN PROCEEDINGS UNDER SECTION 16 OF THE INTERSTATE COMMERCE LAW TO ENFORCE THE COMMISSION'S ORDERS. NOR IS ANY VIOLATION OF THE ANTI-TRUST ACT CLAIMED IN THE PETITIONS TO THE INTERSTATE COMMERCE COMMISSION, IN WHICH THIS CONTROVERSY ORIGINATED, OR FOUND BY THE COMMISSION TO HAVE OCCURRED, OR SHOWN BY ANY FACTS IN THE RECORD TO EXIST. FURTHER, IF THE TERMINAL CHARGE HAD BEEN ESTABLISHED BY AN ARRANGEMENT BETWEEN APPELLEES IN ILLEGAL RESTRAINT OF COMPETITION, THAT WOULD BE NO REASON FOR REDUCING THE AMOUNT OF THE CHARGE, IF $2 IS NOT AN UNREASONABLE AMOUNT.

1. The Commission itself has lately decided that it is not empowered to administer the Anti-Trust Act.

Spriggs v. *B. & O. R'y. Co.*, 8 Interstate Commerce Reports, 443 (No. 9).

2. The functions of the Commission are limited to the administration of the Interstate Commerce Act by the express terms of the statute. The Commission was created only for that purpose.

The Anti-Trust Act, on the other hand, provides for its own enforcement by the courts—not by the Interstate Commerce Commission. Under Section 4 of the Anti-Trust Act "the several Circuit Courts of the United States are hereby invested with jurisdiction to prevent and restrain violations of this act"; and by Section 7 any person injured by violations of the act "may sue therefor in any Circuit Court in the United States."

2 Sup. U. S. Rev. Stats., 763.

Of course, in proceedings to enforce orders of the Commission, the courts cannot entertain complaints that could not have been made to the Commission.

3. No charge of violation of the Anti-Trust Act was made in the pleadings before the Commission, or in the petition to the Circuit Court.

4. No violation of the Anti-Trust Act is found by the Commission, or is shown by any facts in evidence, or is even suggested in the Commission's reasoning. The claim of such violation is only an exhibition of ingenuity on the part of counsel. It is based on the statement of the Commission that "on June 1, 1894, these defendants, by concerted agreement among themselves, increased the rate $2 per car." (Rec., 50.) That is all the Commission said about any "agreement"; and the connection in the findings will show how little the Commission had any violation of the Anti-Trust Act in mind. Where there is competition no railroad can make and keep a charge, however low, if competing roads make a lower one. In a certain sense, therefore, there must always be concert

among railroads, but that is a far different thing from agreements intended as binding obligations (*i. e.*, contracts), whereby the competitors agree not to discontinue or reduce rates. No such contract is found to have been made in this case, or is charged in the pleadings, or is shown by any evidence.

Counsel's other prop for their cry of unlawful combination is found in the fact that the $2 tariffs were, many of them, filed with the Interstate Commerce Commission through the "Western Freight Association." Is there anything unlawful in that? Filing tariffs is an act *required* by law, instead of being unlawful; and it may be done through any agent whatever. It may relieve counsel, however, to recall (as they have not stated) that each of the appellee companies likewise filed these $2 tariffs directly for itself, beside the filing through the Association.

No evidence whatever was received by the Commission or Circuit Court on the subject of combination among appellees.

5. Even if a rate is established by contract in violation of the Anti-Trust Act, that furnishes no reason why the Commission or the courts should require a lower rate to be made, if the existing rate is reasonable in amount. The pains and penalties imposed by the Anti-Trust Act might possibly in such case be inflicted; but no lower rate could be ordered, because it would necessarily be less than reasonable. No amount of conspiracy, combination, trust-building or other thing known by any vituperative epithet, will require work to be done—whether by a railroad or anyone else—for less than a reasonable charge.

Chairman Knapp, of the Interstate Commerce Commission, recognized, in his opinion in the cited case of

Spriggs v. *B. & O. R'y Co.*, that a reasonable rate is not to be reduced because established through an unlawful combination. He said:

> "Assuming that the rate which has been complained of is shown to be maintained by a forbidden contract or combination, if that rate is in fact just and reasonable within the meaning of the Act to Regulate Commerce, what warrant has the Commission for condemning that rate, and where is its authority for requiring the carrier to cease and desist from charging it?" (p. 457.)

IX.

THE CIRCUIT COURT RULED CORRECTLY IN ITS EXCLUSION OF EVIDENCE AT THE HEARING BELOW.

Counsel for appellant do not argue any of the errors assigned in the way of exclusion of evidence by the Circuit Court. We shall advert to them very briefly.

1. It is said the Circuit Court was wrong "in refusing to permit the complainant to prove by the witness Chappell that the general managers of the railroads, including these defendants, entering the City of Chicago from the west, entered into a combination in restraint of trade, and that the $2 terminal charge was made and promulgated by such combination, and that at the time such $2 charge was imposed it was in addition to the old rate, and that the old rate stood as it was previously." (Appellant's Brief; Assignment 7; p. 13.)

This assignment really relates to two different rulings of the Circuit Court, concerning two very different questions, viz., the matter of combination and the meaning of appellees' tariffs. The assignment being entire, it must fail if the Circuit Court was right in either ruling. Both rulings, however, were manifestly correct.

(1) Concerning the alleged combination:

(*a*) Complainant offered no such testimony as the assignment mentions. The ruling of the court was on this question:

> "Q. Now, I ask you, Mr. Chappell, to state to the court who composed the General Managers' Association that you referred to in that testimony?" (Rec., 249, 250.)

While Mr. Day, of counsel for appellant, argued on lines suggesting the assignment of error, no offer of testimony was made beyond the just quoted question (Rec., 250). The answer to the excluded question could not have been material.

(*b*) Even if appellant had offered such testimony as the assignment describes, it should have been excluded, because such testimony would be irrelevant and immaterial, for the reasons set forth in Point VIII, *ante*.

(2) Concerning the question to Mr. Chappell about the tariffs, which was as follows: "I will ask this question—one of my colleagues has suggested that it is pertinent to your Honor's suggestion, and then I will ask Mr. Chappell to stand aside. At the time that you imposed this $2 charge, I will ask you to state whether or not that was in addition to the old rate?" (Rec., 250.) This question was an attempt to have Mr. Chappell construe written tariffs; and their proper construction was a question of law for the court.

2. The Circuit Court is claimed also to have erred "in refusing to permit complainant to introduce in evidence upon the trial of said case the testimony and exhibits taken before the Interstate Commerce Commission." (Appellant's Brief, Assignment 8, p. 14.) The Interstate Commerce Act makes the findings of the Commission *prima facie* evidence, but the act gives no such character to the evidence taken before the Commission.

X.

NEITHER THE CIRCUIT COURT NOR THIS COURT HAS JURISDICTION, IN A PROCEEDING LIKE THE PRESENT, TO MODIFY THE ORDERS OF THE COMMISSION SOUGHT TO BE ENFORCED. THE ONLY QUESTION WHICH SUCH A PROCEEDING BRINGS BEFORE THE COURTS IS WHETHER THE ORDERS OF THE COMMISSION SHOULD BE ENFORCED AS MADE BY THE COMMISSION.

This follows from the fact that the foundation of the Commission's application to the courts must be that defendants have disobeyed a lawful order of the Commission, and thereby have been guilty of unjustified disobedience. If the order as made by the Commission is wrong, so that disobedience to it is permissible, then the disregard of the Commission's order affords no right to bring defendants into court. Hence, the success or failure of the Commission before the courts must depend upon the propriety of its orders, as actually made, and in the form which the defendants have disregarded.

The same conclusion results from the statement of the Interstate Commerce Act that the application of the Commission to the courts is only "to enforce" the Commission's orders. The Act confers upon the courts no power to make a new order in place of the Commission's order. The United States Courts of Appeals have often adjudicated this point.

Interstate Commerce Commission v. *Delaware, L. & W. R. R. Co.*, 64 Fed. Rep., 723.

Detroit, G. H. & M. Ry. Co. v. *Interstate Commerce Commission*, 74 Fed. Rep., 803.

Farmers' Loan & Trust Co. v. *Northern Pacific Ry. Co.*, 83 Fed. Rep., 249.

In the former case Judge Wallace said:

> "The court cannot substitute, for an order actually made, one such as the Commission might or should have made, or such as the Commission intended to but failed to make. This court has no revisory power over the orders of the Commission. Its function in a proceeding like this is merely to inquire whether the respondents, the common carriers, have refused or neglected to perform any lawful order or requirement of the Commission. It cannot undertake to decide whether the respondents have violated one which the Commission might have lawfully made." (p. 723.)

In the latter case the court declared:

> "Nor was there any power in the Circuit Court to modify or change the order of the Commission. Whatever may be the plenary power of a court of equity to command, at the suit of those who are injured, the performance of any duty arising out of a contract or statutory obligation, the jurisdiction it was exercising here is strictly special and statutory, and is limited, as all special jurisdiction is, to the precise power conferred by the Interstate Commerce Act, which is only to compel obedience to the 'lawful order' of the Commission. It has not been granted any broader power to exercise the authority of the Commission itself by substituting a new regulation or order of its own, or modifying that which the Commission has given. It is purely an auxiliary jurisdiction." (P. 841.)

Conclusion.

The judgment of the Circuit Court of Appeals affirming that of the Circuit Court should itself be affirmed.

Respectfully submitted,

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